

EUROPEAN CONFERENCE

FROM TAMPERE 20 TO TAMPERE 2.0

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Background Note: The Schengen Free Movement Area and Internal Border Controls

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Pre-Conference Version

DISCLAIMER

The draft of this note has been prepared by Marie De Somer, Head of Programme at the European Policy Centre and guest professor at the Katholieke Universiteit Leuven. The present document is, however, the result of a process during which some changes have been made following a preparatory workshop and in liaison with the author. This means that the author might not agree with all of the suggestions proposed in this note. Final versions of all the background notes, which will take account of the input provided by the conference, will be published and widely disseminated. References to authors quoted have been reduced to a strict minimum contrary to academic rules due to a lack of space. More details will be provided in the published version of this note.



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Tampere Conclusions:

25. As a consequence of the integration of the Schengen acquis into the Union, the candidate countries must accept in full that acquis and further measures building upon it. The European Council stresses the importance of the effective control of the Union's future external borders by specialised trained professionals.

I. ASSESSMENT OF THE CURRENT SITUATION:

The arrival numbers witnessed in 2015 and 2016 led to a governance crisis in the EU's Dublin system which has spilled over into the Schengen area. At the moment of writing, the Schengen free movement zone has not been border control-free for over four years. The first reintroduction of internal border controls dates back to September 2015 when Germany first reintroduced checks at its land border with Austria following large arrival numbers of asylum-seekers via that route. Austria, in turn, reintroduced checks at its land borders as well, amongst others, to avoid becoming a 'cul-de-sac' where migrants could get stranded. This marked the start of a larger chain reaction in which the following states, and in that respective order, introduced border checks as well: Slovenia, France, Hungary, Sweden, Norway, Denmark and Belgium. Six states - Germany, France, Austria, Norway, Sweden and Denmark - have continued to re-extend controls since.

Crises in Schengen are not new. Infamously, the lifting of the original border checks in 1995 went hand in hand with a severe political conflict that lasted several years as France refused to lift controls at its internal border until, by and large, 1998. More recently, the Schengen free movement zone was the source of political tensions in the context of the so-called 2011 Franco-Italian affair when, following the onward movement of Tunisians from Italy to France, border checks were introduced along the French border with Italy at Ventimiglia. This latter conflict spurred a rethinking of the Schengen rules on temporary internal border checks and a correspondent reform to the Schengen Borders Code (SBC) which was concluded in 2013.

The current crisis is unprecedented however. Never before since the lifting of the original checks in 1995 have internal border controls been upheld for so long by so many states in parallel. Most recently, in May 2019, the six states referred to above sent in a renewed notification highlighting their intention to, again, extend border checks for a new six-month period running up to November 2019. At current, there are no signs that the controls would be lifted once this latest six-month period passes.

These controls have been the subject of much controversy. Criticism relates, first, to states' practices of accumulating different legal bases for introducing what are intended to be 'temporary' controls and, second, to the limited justifications adduced for doing so.

- With respect to the first point, what has been particularly contentious, is the constant shifting from one legal basis to another for justifying the extension of internal border controls once the temporal limits of a certain legal basis have been exhausted. The European Parliament¹ as well as

¹ European Parliament, "Report on the annual report on the functioning of the Schengen area", A8-0160/2018

certain Member States, as appears from internal documents, have called this out for constituting unlawful behaviour.

- As regards the second point, the justifications provided for reinstating internal controls are generally regarded as weak, and it can be questioned whether they meet the necessity and proportionality requirements prescribed by the SBC. Since 2015, states have predominantly cited threats resulting from so-called ‘secondary movements’ of asylum seekers from Greece and other states at the EU external border into Northern-Western Europe. Arrival rates of asylum seekers have, however, dropped significantly since mid-2016. At current, arrival numbers have, by and large, returned to pre-2015 levels. Numbers on subsequent secondary movements are more difficult to come by. The European Commission nevertheless reported, already in the fall of 2017, that such movements had become “limited” as evidenced by the “downward trend observed in asylum applications received at the internal borders of the Member States concerned”.²

Yet, in the most recent notifications, Austria continues to refer to “continuous significant secondary movements”, Germany mentions reasons related to “security and migration” and France refers to security threats linked to a “situation at the external borders”. As appears from internal documents and cursory media comments, those Member States are concerned about the numbers that are still arriving, even if more limited than before, as well as about the possibility of these numbers rising again in future. In respect of the latter concern, they highlight that large numbers of asylum-seekers remain present in Greece and Italy and, second, that there is a continued potential for renewed conflict situations in Northern Africa which could lead to new increases in arrival numbers at the EU’s external borders. In this context, they also repeatedly highlight concerns with the insufficient functioning of the Dublin system. These include, amongst others, concerns about insufficient registration of fingerprints in the Eurodac system by the frontline states, continued difficulties in reception condition standards which preclude Dublin returns, as well as more general problems and debates in the context of devising a new responsibility-sharing mechanism in the context of the reform of the Dublin Regulation.

In the meantime, as the controls continue, they risk to become seen as the ‘new normal’ in the Schengen area of the late 2010s. The situation urgently requires answers. A Europe without Schengen, or with a hollowed-out version of Schengen, would come at a high cost.

- 1) To begin with, the economic consequences would be severe. A study commissioned by the European Parliament on the set-up and operationalisation of the border checks to date estimates that these costs already range between €1 to 3 billion in annual operating expenses and may potentially run up to €19 billion in one-off costs. The broader costs connected to the obstacles for the road transport of goods (accounting for more than 70% of good transport) are much larger. Particularly some of the Eastern European Member States, including Poland, Hungary and Slovenia, are feeling these consequences on their good transport sectors already and have repeatedly voiced complaints about this.
- 2) Second, the sustained controls are a source of political tension between different Member States. For example, increased German controls targeting Greek airlines in German airports led to a political row between German and Greek authorities in the spring and summer of 2018.

² “Communication from the Commission on preserving and strengthening Schengen”, COM(2017) 570

- 3) Third, the reintroduced border checks, and the immigration control context in which they are applied, are leading to increasing observations of practices of racial profiling which are prohibited under EU law. Amongst others, a report from the Financial Times in August 2018 has highlighted how some of the border checks along the German-Austrian border in Bavaria were increasingly becoming subject to racialized practices.³ Such observations have been echoed by NGO's and are repeatedly shared on social media as well.
- 4) Finally, of a less direct but potentially highly problematic nature are the larger, long-term negative effects on public opinion in relation to the European project. A Eurobarometer survey on 'European Perceptions on Schengen' published in December 2018 documented that a large majority of European citizens (seven in ten respondents) agree that the Schengen area constitutes one of the EU's main achievements. This confirms trends in broader polls of the past few years, which have repeatedly shown that a majority of European citizens consider the "free movement of people, goods and services" to be the Union's most important achievement, even surpassing that of bringing about "peace among the Member States". Accordingly, a Europe without Schengen would entail fundamental legitimacy risks for the European project as a whole.

In what follows, this note highlights a number of scenarios on the way forward for the Schengen area. Section A considers policy scenarios that seek to provide remedies within the context of the Schengen Borders Code. Section B looks into questions related to the use of police checks as alternatives for internal border controls. Section C reviews ideas on making membership to the Schengen area conditional on cooperation and good governance in the CEAS which appear to be gaining ground in political and policy circles.

II. IDEAS AND SUGGESTIONS FOR THE FUTURE:

A. Improving Rules on Internal Border Controls in the Schengen Borders Code:

In September 2017, the European Commission proposed to amend the Schengen Borders Code. This proposal envisages the possibility of reintroducing internal border controls for a period of one year, plus an additional maximum period of two years if threats to public policy or internal security persist, leading to a new maximum period of three years. This possibility would go hand in hand with stricter reporting requirements. In addition, an extension after one year up to the three-year maximum would need to be accompanied by a Commission opinion and a Council recommendation.

The proposal originally met with heated debates in the Council. A common position was nevertheless reached in June 2018. This position endorses the new timeframe envisaged but seeks to delete, amongst others, the requirement of a Council recommendation for a continuation of border checks after the first one-year period. The European Parliament, in turn, adopted its report in late November 2018. Amongst the proposed amendments, it seeks to limit the time period for reintroduced border controls to a first period of six months (instead of one year), with a further extension only possible for an additional one-year period maximum (instead of two years). The report also endorses the requirement of a Council recommendation for prolongations beyond the first period. Given the divergent positions between the

³ Khan, M. (2018). Anti-immigration mood drives fears of racist profiling on EU borders. Financial Times, 26 August 2018.

Council and Parliament it soon became clear that a compromise could not be reached before the European Parliament elections of May 2019.

This raises questions about the proposal's future: can negotiations be continued? Should they be? Beyond the difficulties arising from the strongly diverging positions of the European Parliament and Council, additional questions have also been raised on whether extended time periods for internal border checks, coupled with strengthened proportionality and necessity checks, provide the right way forward at this stage. In that respect, it is noteworthy that strengthened necessity and proportionality safeguards were also included in the previous, 2013 reform of the Schengen Borders Code. Arguably, and as has been advanced by some Eastern Member States, under the current rules, the Commission could have already raised stronger concerns around the limited justifications adduced for the controls. What was lacking was not the legal possibility to challenge the sustained border checks but, rather, the political will to do so. In this light as well, some have argued that the 2017 proposal in fact amounts to a Commission attempt at drawing up an 'ex post' legal framework to accommodate the practices of those Member States maintaining internal border controls against the currently applicable rules. The way forward, from this point of view would not necessarily be a reform of the current rules but, rather, the prioritisation of their correct implementation.

As a further line of reasoning, others have argued that, if a reform of the SBC is nevertheless on the table, it should not be limited to the rules on timeframes and necessity requirements. Instead, the reform effort should also be used as an opportunity to tackle a series of further outstanding questions. These include, notably, questions on the grounds for reintroducing border controls (see also section C), on coordination among Member States with regard to the moment at which controls are introduced or lifted, as well as questions on processes to be applied at internal border checks.

This latter question has been a source of particular political attention lately. As noted by experts, it was one of the issues that had not been sufficiently clarified in past SBC reforms. More specifically, article 32 of the SBC provides that where checks at internal borders are reintroduced, the SBC rules on external border controls (Title II) apply *mutatis mutandis*. What that implies in practice, however, has not always enjoyed consensus. The Commission noted, in a 2010 report on the implementation of the SBC, that when border control is temporarily reintroduced such "internal borders do not become external borders".⁴ This reading was recently confirmed by the CJEU in its *Arib* ruling from March 2019. The Court ruled that France was wrongfully applying an exception clause from the Return Directive (Article 2.2 of that directive) at its internal border checks. The exception clause in question allows MSs to limit some of the directive's protection safeguards on the use of detention in relation to "third-country nationals who (...) are intercepted by the competent authorities in connection with the irregular crossing of the *external border* of a Member State" (emphasis added). The Court held, however, that an internal border at which border control has been reintroduced by a Member State is not tantamount to an external border and therefore the exception clause could not be applied to such situations. Essentially, the ruling has been interpreted as putting a check on Member States' discretion in respect of the detention of third-country nationals intercepted at internal border checks. Reportedly, it has spurred consternation in the Council and is the source of calls by some MSs for legislative changes to the respective SBC rules with a view to annulling the judgment's effects.

⁴ "Report from the Commission to the European Parliament and The Council", COM(2010) 554

These observations raise the following questions:

- How to improve the current rules governing the reintroduction of internal border checks?
- What is the appropriate balance of powers between EU institutions and Member States in this area?

Initial suggestions and ideas include:

1. Continue negotiations on the Commission's 2017 proposal or start over on the basis of a new proposal that, at the same time, tackles further outstanding issues.

2. Alternatively, improve and strengthen the implementation of the current rules, including a stronger position-taking by the European Commission when necessity and proportionality requirements are not met.

3. In the context of all of the above suggestions: renew reflections on the appropriate balance of powers between EU institutions and Member States in this area.

B. The Use of Police Checks in Border Regions:

A further dynamic observed in the Schengen area after 2015 is the increased use of police checks by certain MSs in border regions. This appears to be increasingly considered as a policy alternative to, or a compensation for the absence of, internal border checks. Article 23 of the Schengen Borders Code establishes that police checks are allowed provided that: (i) they do not have border control as their objective, (ii) they are based on general police information and aim in particular at combating cross-border crime, (iii) they are devised in a manner clearly distinct from systematic checks at the external borders and (iv) they are carried out on the basis of spot checks.

In a number of judgments, the Court of Justice highlighted the need for precise legal rules when carrying out police checks in border zones. This was considered necessary in order to ensure that the controls do not run the risk of “having an effect equivalent to border checks” which is precluded under the SBC.⁵ Most recently, in December 2018, the Court concluded that German rules requiring coach transport companies to check passports and residence permits of passengers before crossing internal borders, at the risk of fines, fell within the scope of the SBC rules on police checks. In its subsequent examination of whether these rules were sufficiently precise in terms of the intensity, frequency and selectivity of the checks, the Court arrived at a negative conclusion. The German rules at stake were found to amount to measures having an “effect equivalent to border checks” and were, hence, not allowed under the SBC.⁶

At the same time, however, the European Commission has been calling on those MSs still upholding border controls, to lift them whilst maintaining the same level of security by using other tools, such as reinforced police checks. Several MSs, reportedly, support this call and are keen to explore how the use of police checks can be strengthened in future. Most recently, in a document on priorities for the new Commission prepared by the different DGs, Commission officials highlighted that “further alternatives to internal border controls” had to be reviewed. As also stated, such alternatives could be the subject of a targeted legislative proposal that would set out “the possibility for enhanced police checks within the territory including in the internal border area and on the measures that can be taken on the basis of such police checks”.⁷

⁵ *Melki and Abdeli*, C-188/10 and C-189/10; *Adil*, C-278/12; *A.*, C-9/16

⁶ *Touring Tours*, C-412/17 and C-474/17

⁷ DGx Proposed Priorities. Available at: https://www.politico.eu/wp-content/uploads/2019/08/clean_definite2.pdf

These observations raise the following question:

- What role to give to police checks in the Schengen zone of the future?

Initial suggestions and ideas include:

4. Start a series of renewed reflections on the relation between internal border controls and police checks.

C. Making Schengen conditional on cooperation and good governance in the CEAS:

On 4 March 2019, President Macron called for a rethinking of the Schengen area. He stated in this respect that: “All those who want to be part of Schengen should comply with obligations of responsibility (stringent border controls) and solidarity (one asylum policy with the same acceptance and refusal rules)”. These statements were echoed, and further detailed, by Dutch Prime Minister Mark Rutte who, in a media interview on 16 May, declared that “if Eastern European countries continued to refuse solidarity, they needed to start feeling the consequences”. More specifically, these states needed to be made aware that membership of the Schengen border-free zone came hand in hand with solidarity in the context of the EU’s asylum policy. If they would not live up to this, Western European countries could - in the future - respond by reinstating controls in such a way that they would cut off Eastern Europe from Schengen.

Conditionality links between Schengen and the CEAS - more specifically the Dublin system – are not new. They can in fact be traced back to 1990 when the Dublin Convention was adopted as a measure to compensate for control losses that were feared to emanate from the abolishment of internal border controls. The question on whether and how to give these links practical effect when faced with problems in the CEAS is a more difficult one. The current SBC already provides for the reintroduction of internal border controls in the event of “serious deficiencies in the carrying out of external border control” (article 29) which was triggered in 2016. However, it does not make an explicit link to deficiencies in the CEAS generally, or the Dublin system more specifically.

Ideas on how to further link Schengen and the CEAS appear to increasingly gain ground. At least three scenarios on how this can be accomplished can be identified, but none of them are problem-free. In what follows each scenario is considered in turn, highlighting specific options as well as difficulties.

- 1) To begin with, a first, more cautious scenario consists of a series of legislative changes that would bring the governance of both systems closer together. This could, to begin with, include stronger information-sharing and monitoring mechanisms, as well as stronger cooperation and operational support structures. To give examples, stronger cooperation could be achieved by establishing a specific ‘Schengen Council’ within the Council’s structures that would meet on a regular basis in order to pick up on potential problems, as for instance identified by the Schengen Evaluation Mechanism (SEM) reports, and provide for joint remedies as early as possible. A further centralisation of operational support could be accomplished through enhancing the mandate of EU agencies. Options would be provided to escalate the process - should problems persist in spite of the closer governance – including the reintroduction of internal border controls. This would require adding a new, more explicit ground for introducing border checks in the case of continued problems in the CEAS to the Schengen Borders Code (see also, in this respect, Section A). Scenarios along these lines appear to be contemplated within the Council structures, particularly by representatives from Northern-Western Member States.

Similarly, the DGx proposed priorities document referred to above, makes mention of the possibility of “creating legal links between a new system of determining and sharing responsibility (in the area of asylum) and the Schengen acquis”. As the document continues, the new rules on determining and sharing responsibility could become part of the Schengen acquis so that, “on the one hand, the new rules would become subject of the Schengen evaluations”, and “on the other hand, persistent deficiencies in the implementation of those rules would become a new reason for recommending the reintroduction of internal border controls”.

It remains to be seen whether such proposals, and particularly the idea of safeguards in the format of reintroduced internal border controls, would be able to garner sufficient political support among Southern and Eastern European states. It is noteworthy in this respect that the European Parliament already tried, in the context of the recent negotiations on a European Asylum Agency (EUAA), to provide for a stronger monitoring role of that agency with an explicit reference to the triggering of Article 29 SBC. This proposal, reportedly, was not accepted in Council, precisely, because of opposition from those MSs most often linked to a problematic implementation of the CEAS acquis.

- 2) A second scenario appears from the statements of President Macron and, particularly, Prime Minister Rutte and is bolder in nature in that it would entail a full-fledged separation of Western and Eastern Europe. Neither of the statements provide much detail on how exactly, or on the basis of which grounds, such controls would be instated. It is in any case clear that the exclusion of a State from the Schengen area cannot be accomplished without a Treaty change, which would require unanimity. As the States targeted would not vote in favour of such a change, this option can immediately be discarded. The most likely course of action seems, instead, to be a continuation, as well as a reinforcement of the controls that are currently already in place. However, as highlighted at the beginning of this note, these checks are already considered as unlawful. Their further expansion, both in time as well as in scope, would entail a clear(er) violation of EU law (in particular article 77 TFEU). It then becomes unclear how such controls could be justified as a reaction to other States not upholding their EU law commitments.
- 3) This leads to a third scenario that has repeatedly been suggested in the past and appears to currently make its return in response to calls along the lines of those made by President Macron and Prime Minister Rutte, i.e., to move towards a ‘Europe at different speeds’. This could be achieved by making use of the enhanced cooperation mechanism provided under Article 20 TEU. Article 20 TEU provides that at least nine Member States are necessary to launch an enhanced cooperation which must also be authorized by the Council by means of a qualified majority vote. Such an enhanced cooperation would need to be adopted as a ‘last resort’, meaning that its objectives cannot be attained within a reasonable period by the Union as a whole. This scenario could, in various formats, provide for stronger links, including conditionality and connected safeguards, between Schengen and Dublin through rules which move beyond those currently in place. Again, the political feasibility of such mechanisms would need to be examined. Amongst others, as highlighted by some MSs representatives, to the extent that such systems would also entail a stronger commitment from the part of Western Member States to responsibility-sharing for refugees without the full cooperation of all Member states, it may be a sensitive sell to domestic electorates.

These observations raise the following questions:

- Should membership to the Schengen Area be made conditional on good governance in the context of the CEAS, in particular the Dublin system, and if so, how?

Initial suggestions and ideas include:

5. Careful consideration of the three scenarios listed above, including their respective limitations.