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Internal border controls in the Schengen area: Is Schengen crisis-proof?

Study for the LIBE committee



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

Internal border controls in the Schengen area: is Schengen crisis-proof?

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizen's Rights and Constitutional Affairs at the request of the LIBE Committee, analyses the Schengen area in the wake of the European 'refugee crisis' and other recent developments. With several Member States reintroducing temporary internal border controls over recent months, the study assesses compliance with the Schengen governance framework in this context. Despite suggestions that the end of Schengen is nigh or arguments that there is a need to get 'back to Schengen', the research demonstrates that Schengen is alive and well and that border controls have, at least formally, complied with the legal framework. Nonetheless, better monitoring and democratic accountability are necessary.

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CONTENT

LIST OF ABBREVIATIONS	5
LIST OF FIGURES	7
LIST OF TABLES	7
EXECUTIVE SUMMARY	8
1. INTRODUCTION	12
1.1. Background: Refugee crisis in 2015/16	12
1.2. Reaction to the refugee crisis: Reintroduction of internal borders	15
1.3. Political context	17
1.4. Methodology	17
1.5. Structure of the study	18
2. SCHENGEN AND 'CRISES': A BRIEF BACKGROUND	20
2.1. Brief overview of the Schengen Area	20
2.2. The reintroduction of internal border checks	23
2.3. The 2011 Franco-Italian affair: Was there a breach of the Schengen Borders Code?	23
2.4. The substance of the 2013 Schengen governance reform	25
2.5. 'The Schengen Freeze' and the European Parliament's Role	26
3. MAPPING CHANGES IN THE SCHENGEN GOVERNANCE FRAMEWORK	27
3.1. Innovations in the revised the Schengen Borders Code	27
3.2. Changes in the Schengen Evaluation and Monitoring Mechanism	31
3.3. Role of the Commission, the Parliament and national parliaments	34
4. STATE OF PLAY: WHAT DOES THE SCHENGEN BORDERS CODE MEAN IN PRACTICE?	38
4.1. A legal assessment of the justifications provided by Member States on the reintroduction of intra Schengen border controls 2015-16	39
4.2. Third country national movements or refugee movements?	42
4.3. How well do borders work as a response to terrorism?	45
4.4. The scope of the controls	45
4.5. The Visegrad States	46
4.6. The right to asylum, in light of the reintroduction of intra-Schengen border controls	48
4.7. Exceptional circumstances and the overall functioning of the Schengen area	51
4.8. Informal borders and fences	54
4.9. No complaint – No Impact on free movement of persons?	58
5. IS THE SCHENGEN EVALUATION AND MONITORING MECHANISM FIT FOR PURPOSE?	59

5.1. Results of the Schengen Evaluation and Monitoring Mechanism	59
5.2. Role of EU agencies in the evaluation of external borders management and capacities	64
6. CONCLUSIONS AND RECOMMENDATIONS	72
REFERENCES	76
ANNEX 1. SUMMARIES OF CJEU CASE LAW ON THE SCHENGEN BORDERS CODE	85
ANNEX 2. EU LARGE-SCALE INFORMATION SYSTEMS: WHO HAS ACCESS TO WHAT?	89
ANNEX 3. ANALYSIS OF MEMBER STATE NOTIFICATIONS ON THE REINTRODUCTION OF BORDER CONTROLS AT THE INTERNAL BORDERS OF THE SCHENGEN AREA, SEPTEMBER 2015-MAY 2016	94
ANNEX 4. REPORT ON STAKEHOLDER DISCUSSION	113
ANNEX 5. DEVELOPMENTS ON THE APPLICATION OF THE ARTICLE 29	118

LIST OF ABBREVIATIONS

CEAS	Common European Asylum System
CISA	Convention Implementing the Schengen Agreement
CJEU	Court of Justice of the European Union
DG HOME	Directorate-General for Migration and Home Affairs
DG JUST	Directorate-General for Justice and Consumers
EASO	European Asylum Support Office
EBCG	European Border and Coast Guard
ECAS	The European Citizen Action Service
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EP	European Parliament
EUCFR	The EU Charter of Fundamental Rights
EURODAC	The EU asylum fingerprint database
Eurojust	The European Union's Judicial Cooperation Unit
Europol	European Police Office
FRA	European Union Agency for Fundamental Rights
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
JHA	Justice and Home Affairs
MEP	Member of the European Parliament
Moi	Ministry of Interior Affairs
MS	Member State
SBC	Schengen Borders Code - Regulation (EU) 2016/399
SEM	Schengen Evaluation Mechanism – Regulation (EU) 1053/2013
SIS II	Schengen Information System (second technical version)
TFEU	Treaty on Functioning of the European Union

UNHCR United Nations High Commissioner for Refugees

VIS Visa Information System

LIST OF FIGURES

Figure 1: Asylum Applications EU-28 1998-2015 12
Figure 2: Total Relocation of Asylum Seekers Oct 2015 – mid-May 2016 13
Figure 3: First-Time Asylum Applications EU-28 (January 2014 – December 2015) 14
Figure 4: Schengen Internal Borders: Developments September 2015 – March 2016 15
Figure 5: Schengen Internal Borders: Developments April 2011 – June 2015 24
Figure 6: Schengen evaluation mechanism evaluation in relation to Article 29 32

LIST OF TABLES

Table 1: Categories of the Countries in the Schengen Area 21
Table 2: Relevant Schengen Borders Code articles for re-instating internal border
controls 22

EXECUTIVE SUMMARY

The events of 2015-2016, which have been referred to as ‘the European refugee crisis’¹, have shown the limits of European migration, border and asylum policies and have placed their foundations under strain. Some EU Member States (MS) reacted to the increase in entries by asylum seekers by re-introducing internal border controls. On 12 May 2016 the Council adopted a decision allowing five Member States - Germany, Austria, Denmark, Norway and Sweden - to continue internal border checks on the basis of structural and “serious deficiencies” in the external border management system in Greece, which “put at risk the overall functioning of the area without internal border control”. These developments have fuelled discussions about Schengen being ‘in crisis’, with some voices even referring to ‘the end of Schengen’ or calling for the scrapping of the border-free area.

Against this backdrop, the current study examines the following questions:

- Is this rhetoric justified? Is the current Schengen governance system crisis-proof?
- Is Schengen’s legal framework being effectively implemented and how could it be improved?
- Is legislative reform needed?
- How can we ensure more effective supervision, evaluation and democratic accountability of Schengen standards?

The study focuses on the implementation dynamics and challenges experienced in the operability of the post-2013 Schengen governance framework in the light of the above-mentioned developments. The study provides a legal assessment of its implementation and sets out concrete policy recommendations to improve Schengen governance.

How did the 2013 Schengen governance reform come about?

It was a 2011 dispute between France and Italy that demonstrated the need for a strengthened Community method in the Schengen evaluation and monitoring mechanism and the use of exceptions. The previous intergovernmental governance framework had proved ineffective in addressing the 2011 Franco-Italian affair and guaranteeing the protection of ‘the spirit of Schengen’. After the reform of 2013, the European Commission gained more scrutiny powers in assessing MS’ compliance with the Schengen Borders Code as well as in assessing the proportionality, necessity and impact of the reintroduction of internal borders on fundamental rights and freedom of movement. The European Parliament acquired access to the results of Schengen evaluations and some scrutiny powers in both Schengen evaluations and the reintroduction of internal border checks procedures. (See Section 2 of this Study)

What were the main innovations of the Schengen governance framework?

The Schengen Borders Code (SBC) procedures under Articles 26-29, which permit the re-introduction of internal border controls in exceptional circumstances, had been carefully crafted to delineate their application. With the 2013 reform, the SBC acquired more detailed rules on the criteria and time limits for temporary border checks (Articles 25 and 26). In addition, the new SBC increased accountability by including *ex-post* reporting obligations and the bi-annual reports from the Commission to the Council and Parliament. However, the main innovation of the new SBC was Article 29, which allowed the reintroduction of internal border controls for up to two years where ‘serious deficiencies’ at the external borders are detected.

¹ The authors of this study are critical about the widely used term “refugee crisis” as it does not indicate the roots of the crisis, though this discussion is out of the scope of the current study.

The Schengen evaluation and monitoring (SEM) mechanism shifted from being very intergovernmental towards being more European. Now, the Commission (namely, DG HOME) is in the driving seat of for the SEM mechanism, and not the Council. Members of the European Parliament (MEPs) can access the findings of evaluations under the new confidentiality rules, though practical arrangements limit parliamentary scrutiny. In addition, there is a lack of transparency on how individual MS influence the final output of the Schengen evaluations. The new SEM entered into force only in 2015. (See Section 3)

When and how was the Schengen governance reform applied in 2015/2016?

The European refugee crisis has put the 2013 Schengen Governance reform to the test. In March 2016, the Commission outlined its **"Back to Schengen" plan**, which referred to the possibility of using Article 29 of the SBC for prolonging internal border controls. The proposal came about at a time of huge political pressure, with the maximum eight-month period provided for under the combined procedures of Articles 28 and 27 of the SBC about to expire in the five MS applying temporary internal border controls (Austria, Germany, Denmark, Norway and Sweden), and with a set of new Commission legislative and policy initiatives in response to the asylum challenge entering inter-institutional negotiations or being applied on the ground. (See Section 1)

Schengen Borders Code: formally respected, but not respected 'in spirit'

All the MS have reintroduced internal border controls within the scope of the SBC rules. However, if assessed carefully, none of the notifications satisfy the simple criterion in Article 26 of making an assessment "regarding likely impacts of any threats to public policy and internal security". The European Commission has shied away from consistently applying the proportionality assessment to MS justifications, and checking their arguments against evidence. Member States, in their official notifications, cited two main reasons or sources of threat justifying derogations from the border-free area - 'mass migration'/ 'refugee movements' and the 'risk of terrorism'. As regards these grounds, this study demonstrates that there has been a noticeable lack of detail and evidence given by the concerned EU Member States. For example, there have been no statistics on the numbers of people crossing borders and seeking asylum, or assessment of the extent to which reintroducing border checks complies with the principles of proportionality and necessity.

Furthermore, it is striking that the main complaint in the MS notifications was, in essence, that Greece had not prevented refugees from arriving in the first instance, and subsequently that Greece had failed to keep them within its territory. The majority of refugees who arrived in 2015/16 were entitled to asylum, and could not be 'Dublinised' to Greece due to serious deficiencies in the asylum system following the European Court of Human Rights (ECtHR) decision in *MSS v. Belgium and Greece*. Given these refugee arrivals, the MS opted to apply the Schengen governance framework instead of the Common European Asylum System (CEAS). The current application of the SBC leaves open the question of how the reintroduction of internal borders addresses the shortcomings of national asylum and reception systems in the EU. (See Sub-Section 4.2)

If we look at the threat of 'terrorism' justification put forward by Malta and France, it remains unclear whether and how the reintroduction of border controls at internal EU borders would help in dismantling terrorist networks. (See Sub-Section 4.3)

What is the role of Schengen Evaluation and Monitoring mechanism?

The SEM evaluation was the main source of information triggering Article 29 of the SBC. The Council Implementing Decision of 12 May 2016 mainly relied on the findings of the unannounced on-site visit by the Schengen Evaluation Team of Experts on the 10-13

November 2015. In mid-May 2016, however, the situation was different from the one at the peak of the crisis - the EU-Turkey Statement had been concluded and the so-called 'Balkan route' blocked. Thus, very few refugees were in fact reaching the five MS that wanted to continue their internal border controls. For these MS, the main reason for the prolongation of internal border controls was the 'fear' of 'secondary movements' of refugees from Greece and the unclear destiny of the EU-Turkey Statement. This study argues that if the 'fears' of 'secondary movements', without any factual basis, were to be accepted as proportionate and legitimate reasons, it would undermine the very legal foundations of Schengen. (See Sub-section 4.7. and Section 5)

Where is the line between 'border controls' and legitimate 'police checks'?

In addition to the above, several EU Member States have used internal police checks in border areas for 'migration control' purposes, which seems to be contrary to Article 23 of the SBC and recital 26 of the SBC. This study demonstrates that the line between 'police checks' and 'border controls' is often unclear both in law and in practice. Youth organisations have raised concerns that reinforced police checks in the border areas are becoming systematic and discriminatory. (See Sub-Sections 4.8., 4.9. and Annex 4).

In addition, police 'function creep' is seen in the classification of 'asylum seekers' as 'irregular immigrants' and the fact that they are subsequently subjected to policing measures, such as registration in the Schengen Information System (SIS). Asylum seekers are instead to be registered to EURODAC and subject to the CEAS, the UN 1951 Geneva Convention and the Charter of Fundamental Rights of the European Union. The study shows that, with a growing tendency to use internal police checks by some EU MS, these actions should be subject to greater scrutiny and evaluation to ensure that they are not tantamount to border checks.

The study concludes that, despite the developments of 2015-2016, Schengen is 'fit for purpose' and here to stay, though many gaps and open questions still need to be addressed. The following **recommendations** are made with the aim of addressing them:

- The Schengen *acquis* was applied throughout the crisis. Thus, we do not really need to get "back to Schengen" as we never abandoned it.
- Recent developments do not justify new legislative reforms of the SBC or the SEM, as both instruments are too recent. This would negatively affect legal certainty.
- The Commission should better verify and scrutinise Member States' justifications against the proportionality and free movement/fundamental rights test. The Commission should play its role as guardian of EU law and the treaties and not mediate among the competing interests of Member States – this is the role of the Council.
- The European Parliament and national parliaments should have better access to information and play their role in scrutinising Member State actions, in particular those affecting fundamental rights.
- The SEM should not creep into the area of the CEAS. A separate evaluation and monitoring mechanism on asylum issues should thus be established in accordance with Article 70 TFEU.
- Member States should inform the Commission and the Parliament about internal police checks in border areas. There should be clear guidelines from the Commission in this area.
- Upcoming SIS II amendments should include the possibility for an independent Commission assessment, checking against databases used at internal border areas to detect 'systematic police checks' at internal borders.

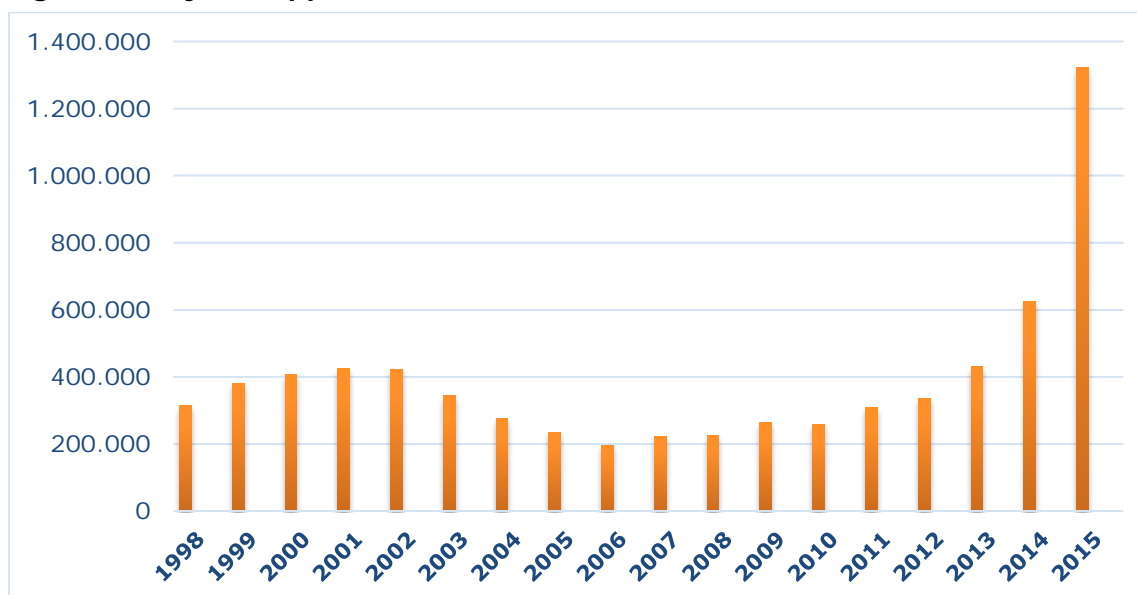
- The relationship between the current Frontex risk analysis, the European Border and Coast Guard vulnerability assessment and the SEM should be better clarified;
- To ensure fundamental rights compliance and further reporting to the Parliament, as provided for in recital 14 of the SEM, the FRA should become a permanent observer to all SEM missions, including on internal borders.
- The role of civil society should be strengthened in the SEM, by allowing independent shadow reporting.

1. INTRODUCTION

1.1. Background: Refugee crisis in 2015/16

The large number of asylum seekers and the lack of European solidarity at the EU's external borders have been said to put the Schengen Area at risk.² The continuation of the regional wars in Iraq, Afghanistan and particularly in Syria - where the conflict is in its sixth year and has seen the devastation of whole cities - has resulted in a bulge in the number of people seeking asylum in the EU. Against this backdrop, EUROSTAT³ reports that, in 2015, 1.2 million people applied for asylum in the EU, which is about double the 2014 number (see Figure 1).

Figure 1: Asylum Applications EU-28 1998-2015



Source: Authors.⁴

The top three nationalities to seek asylum were Syrians, Afghans and Iraqis.⁵ The distribution of asylum seekers across the Member States was a matter of some political salience, resulting in two Council decisions on the relocation of 160,000 asylum seekers from Italy and Greece.⁶ However, these decisions concerned only those asylum seekers with a nationality with a recognition rate of 75% or over, basically Syria, Eritrea and Iraq. These two decisions have not resulted in particularly successful shifts of state responsibility. Indeed, the Commission indicates that less than 1,600 asylum seekers had been relocated by April 2016 (see Figure 2 below).

² Guild, E., Brouwer, E., Groenendijk, K. and Carrera, S. (2015), "What is happening to the Schengen borders?" *CEPS Paper in Liberty and Security in Europe*, No. 86, December 2015.

³ EUROSTAT (2016), Asylum Statistics, Official website.

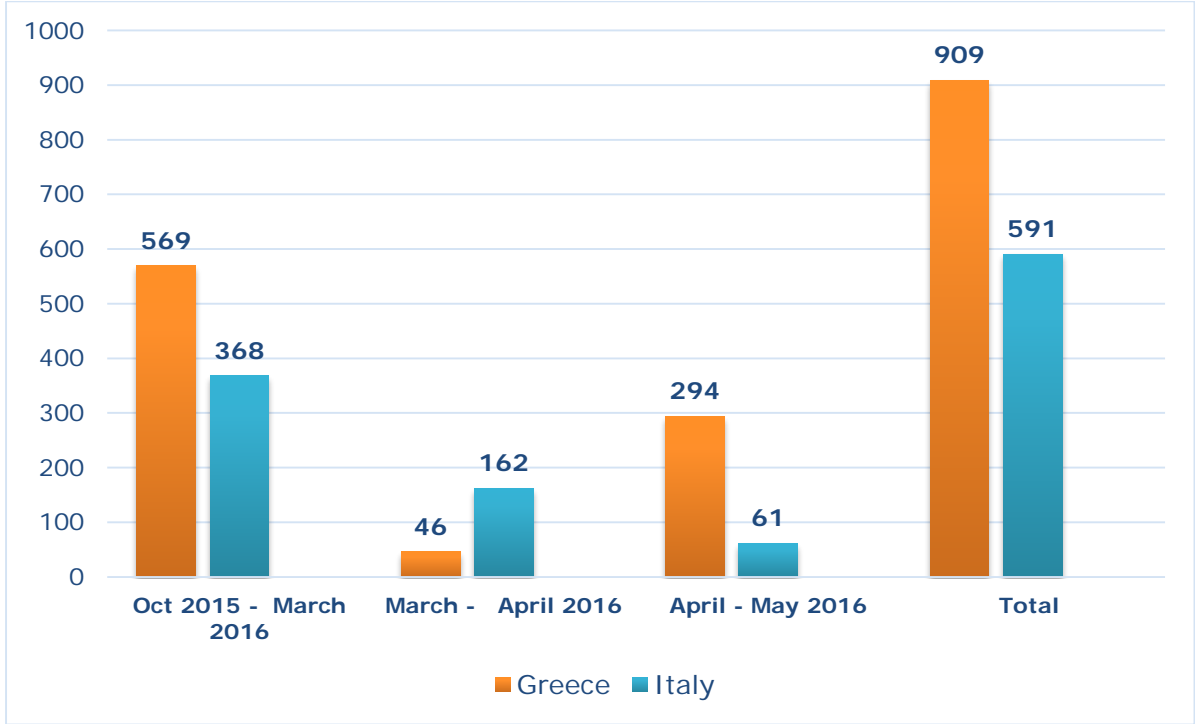
URL: http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics.

⁴ Guild, E. and Carrera S. (2016), "Rethinking asylum distribution in the EU: Shall we start with the facts?," in *CEPS Commentary*, 17.06.2016.

⁵ EUROSTAT (2016), Asylum Statistics, Op.cit.

⁶ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015 and Council (2015), Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.9.2015.

Figure 2: Total Relocation of Asylum Seekers Oct 2015 – mid-May 2016

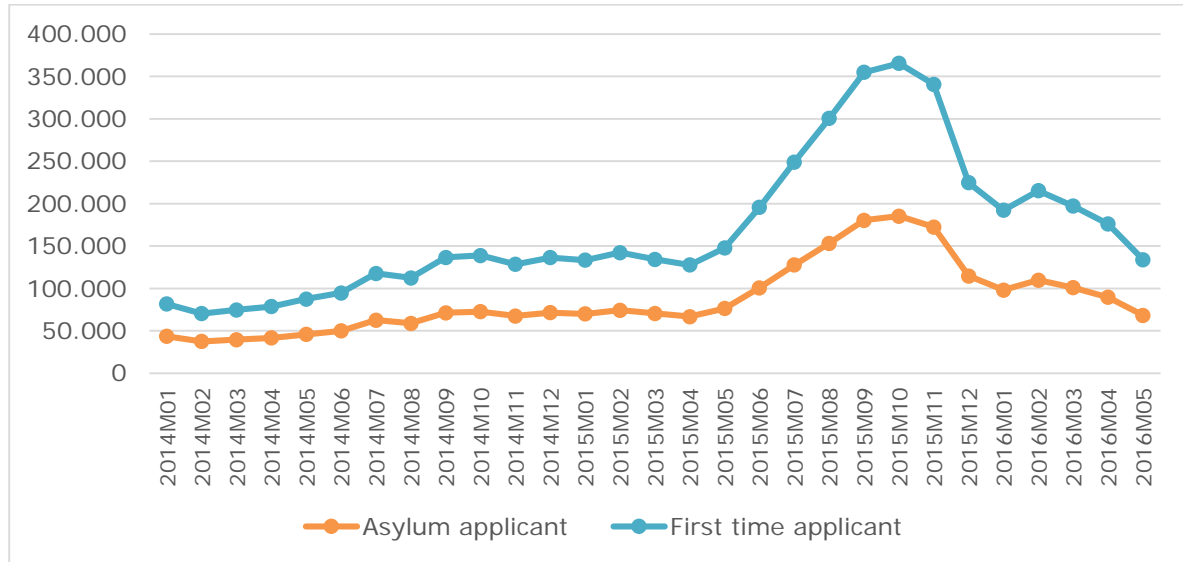


Source: Authors.⁷

One of the most contested questions is where these people first sought asylum. Eurostat data indicates that over the 12-month period, there were 1,256,000 first-time asylum applications in the EU 28. As Eurostat data indicates, Germany received 441,800 asylum applications, Hungary 174,435 and Sweden a total of 156,110. During the period between October and December 2015 (Q4) alone Germany received 162,540 applications, corresponding to 38% of the total across EU Member States. There were surprisingly low numbers of asylum applications among the bigger Member States. For instance, France only received 70,570 applications, Italy 83,245 and the UK 38,370. According to Eurostat, five Member States accounted for 75% of all applications – Germany, Sweden, Austria, Italy and France.

With the EU offering no legal avenues for protection seekers to reach the EU and access the Common European Asylum System (CEAS), refugees arrived by and large irregularly on unseaworthy little boats from Turkey to Greece, instead of arriving in an orderly way in the EU to seek asylum. Then, although these people were within the Schengen area, on account of a lack of documentation, they were unable to move on rapidly to seek asylum in Member States with properly-functioning asylum systems. Instead, an extraordinary series of *ad hoc* responses came into place, resulting in the opening of a fairly safe route, known as the 'Balkan route' from Greece to northern Europe, from about September onwards until it was firmly shut in January 2016. By the end of December 2015, the numbers of applicants had already started to decrease (see Figure 3).

⁷ Guild, E. and Carrera S. (2016), "Rethinking asylum distribution in the EU: Shall we start with the facts?," *Op.cit.*, based on: European Commission (2015), ANNEX to the Communication Third report on relocation and resettlement, Annex 1, Relocations from Greece by 13 May 2016, COM(2016) 360 final, Brussels, 18.5.2016; and European Commission (2015), ANNEX to the Communication Third report on relocation and resettlement, Annex 2, Relocations from Italy by 13 May 2016, COM(2016) 360 final, Brussels, 18.5.2016.

Figure 3: First-Time Asylum Applications EU-28 (January 2014 – December 2015)

Source: Eurostat (migr_asyappctzm), 2016.

The Balkan route revealed the incomplete nature of the Schengen area. According to the design of the Schengen border-control-free area, asylum seekers arriving in Greece should have been able to purchase cheap flights to anywhere in Schengen and go there without any further identity control.

As an area without internal controls on the movement of persons, Schengen did not deliver for these asylum seekers. Refugees coming were unable to catch cheap flights to and within the EU because of the application of identity checks and the threats of carrier sanctions against airlines carrying people.⁸ Airlines and other transport companies feared boarding people who had no valid travel documentation or had not been subject to checks from Greece or from elsewhere coming into the Schengen area. This incoherence within the Schengen system became even more noticeable when the Greek authorities began to issue certificates of registration to asylum seekers in order to facilitate their movement across the Balkan route, which permitted asylum seekers to move from Greece by land into Macedonia and then northwards, but were not sufficient for these same people to catch a (much cheaper) flight to their end destination. These developments were later compared to shutting down the Balkan route.⁹

Thus the intersection of the arrival of refugees in larger numbers than anticipated and the perception of unreasonable pressure on the intra-Schengen borders is evident. The most substantial issue was the reaction to refugee arrivals not via the CEAS, but by the reintroduction of internal borders, a move designed to regulate movements of third country nationals, but one which should not be applied to refugees.

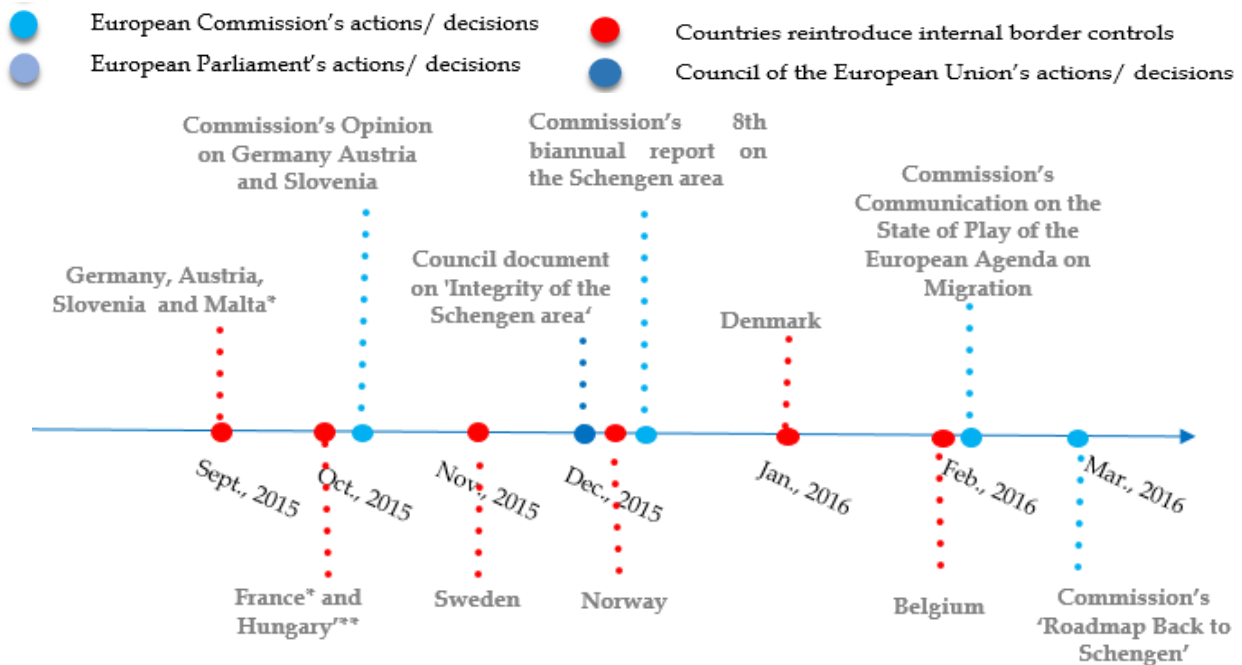
⁸ Peers, S. (2015), "The Refugee Crisis: What should the EU do next?" *EU Law Analysis*, 08.09.2015, at : <http://eulawanalysis.blogspot.be/2015/09/the-refugee-crisis-what-should-eu-do.html>.

⁹ European Commission (2015), Report from the Commission to the European Parliament and the Council on the follow-up to the Leaders' Meeting on refugee flows along the Western Balkans Route, COM(2015) 676, Strasbourg, 15.12.2015.

1.2. Reaction to the refugee crisis: Reintroduction of internal borders

After September 2015, several Schengen countries - Germany, Austria, Slovenia, Hungary¹⁰, Sweden, Norway, Denmark and Belgium - reintroduced internal border controls due to an alleged "big influx of persons seeking international protection" or "unexpected migratory flow"¹¹ (see Figure 4).

Figure 4. Schengen Internal Borders: Developments September 2015 – March 2016



* - Malta and France introduced internal border controls to counter the "threat of terrorism" under the procedure of Article 27 (former Article 24) of the Schengen Borders Code (foreseeable events);

** In October, 2015 Hungary started to build internal fences on its border with Slovenia, though it abandoned the measure quickly.

Source: Authors.

All of the above-mentioned countries (except Hungary) initially invoked the procedure under **Article 28 of the Schengen Borders Code (SBC)**, which allows Member States to reintroduce internal border controls for unforeseen circumstances that pose a "serious threat to public policy or internal security".

¹⁰ Hungary started to build internal fences on its border with Slovenia, though it abandoned the measure quickly. Interview with Slovenian Permanent Representation, 30.05.2016.

¹¹ European Commission (2015), Communication from the Commission to the European Parliament and the Council, Eighth biannual report on the functioning of the Schengen area 1 May - 10 December 2015, COM(2015) 675 final, Strasbourg, 15.12.2015; European Commission Website, "Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 23 *et seq.* of the Schengen Borders Code", 2016 at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf; European Commission (2016), ANNEX 1 to the Communication from the Commission to the European Parliament, the European Council and the Council, *Back to Schengen - A roadmap*, COM(2016) 120, Brussels, 4.3.2016.

Hungary started to install a barbed-wire fence on internal Schengen border with Slovenia at the end of September.¹² The issue was controversially settled and the construction works were quickly stopped under a bilateral agreement with Slovenia.¹³ Nevertheless, since 2015 July Hungary has managed to build the fence on the external Schengen border with Serbia¹⁴ and Schengen accession country Croatia¹⁵ and even planned to extend the fence to Romania.¹⁶ **Slovenia** notified the Council about its internal border controls in mid-September 2015 and revoked its internal border controls as soon as mid-October 2015 (see Sub-Section 4.5). Subsequently, however, Slovenia followed the Hungarian authorities in building a fence with Croatia.¹⁷ (See Sub-sections 4.5. and 4.8.3.).

Belgium was the last country to re-introduce internal borders (23 February 2016) under **Article 28**, fearing the arrival of refugees from the Calais refugee camp. After April 2016, Belgium did not prolong its internal border controls.

Germany, Austria, Sweden, Denmark and **Norway** subsequently invoked the **Article 27 of the SBC**, which allows a Member State to prevent foreseeable threats.

In addition, two other Member States – **France** and **Malta** - reintroduced internal border controls in line with the procedure under **Article 27 of the SBC**, which can be used to prevent a foreseeable “serious threat to public policy or internal security”. Both Member States initiated border controls due to important international events (COP 21 – Paris Climate Conference and the Valletta Summit, respectively) and associated these events with a terrorist threat. Nevertheless, **France**, from January 1 2016, has continued its border controls after the Paris attacks due to the subsequent ‘state of emergency’ and big sporting events, such as the Tour de France and the European Football Championship (see Section 4 for further discussion).

Following the unannounced on-site Schengen evaluation on Greek external borders in November 2015, the Council Implementing Decision of 12 February found ‘serious deficiencies at external borders’.¹⁸ Subsequent rounds of recommendations to address the deficiencies followed (see Annex 5). Nevertheless, on 12 of May 2016, another Council Implementing Decision¹⁹ triggered **Article 29 of the SBC**, which allowed the prolongation of

¹² *Novinite (Sofia News Agency)*, “Hungary Starts Building Razor-Wire Fence along Border with Slovenia,” September 24, 2015. URL: <http://www.novinite.com/articles/170976/Hungary+Starts+Building+Razor-Wire+Fence+along+Border+with+Slovenia>.

¹³ Interview with Slovenian Permanent Representation, 31.05.2015.

¹⁴ Associated Press, “Hungary Begins Building Serbia Border Fence to Curb Migrants.” *Wall Street Journal*, 13.07.2015. URL: <http://www.wsj.com/articles/hungary-begins-building-serbia-border-fence-to-curb-migrants-1436799052>.

¹⁵ “Hungary starts building fence on Croatian border”. *Deutsche Welle*. 18.09.2015. URL: <http://www.dw.com/en/hungary-starts-building-fence-on-croatian-border/a-18721670>.

¹⁶ “Hungary preparing to extend border fence towards Romania.” *Reuters.com*. 15.09.2015, <http://www.reuters.com/article/us-europe-migrants-hungary-romania-idUSKCN0RF1JW20150915>

¹⁷ Barbara Surknov, “Slovenia Builds Border Fence to Stem Flow of Migrants,” November 11, 2015 in *New York Times*. URL: http://www.nytimes.com/2015/11/12/world/europe/slovenia-border-fence-migrants-refugees.html?_r=0; Simon Tomlinson, “Will a fence halt the human tide flowing into Slovenia? Country becomes latest to build barriers along its borders as 47,500 migrants arrive in just a few days,” 23 October 2015 in *Daily Mail*, <http://www.dailymail.co.uk/news/article-3286365/Slovenia-latest-country-resort-building-fences-borders-47-500-migrants-enter-overwhelmed-nation-days.html>.

¹⁸ Council (2016), Council Implementing Decision setting out a Recommendation on addressing the serious deficiencies identified in the 2015 evaluation of the application of the Schengen acquis in the field of management of the external borders by Greece, Council document 5985/16, Brussels, 12.02.2016.

¹⁹ Council (2016), *Council Implementing Decision setting out a Recommendation for temporary internal border control in an exceptional circumstances putting the overall functioning of the Schengen area at risk*, 8835/16, Brussels, 12.05.2016.

checks for an additional six months in **Germany, Austria, Sweden, Denmark and Norway** (see Sub-section 4.7. and Sub-section 5.1.1.).

1.3. Political context

As regards the **political context**, the decision to apply **Article 29** came in a highly politicised environment. According to the Commission's Proposal underpinning the Council Recommendation (emphasis added):²⁰

"Border control should only take place during the time necessary to remedy all the serious deficiencies in the management of the Union's external border. Several legislative initiatives and actions undertaken by the Union in order to reinforce its external border management (**European Coast and Border Guard**, return to a **full application of EU asylum law provisions by the Hellenic Republic**, stepping up of the implementation of the **emergency relocation scheme**, the **EU-Turkey Statement**) should also be in place and fully operational without delay and thus further contribute to a **substantial reduction in the secondary movements of irregular migrants.**"

As indicated above, these policy and legislative initiatives had been presented by the Commission in response to the so-called European refugee crisis. The key target of these initiatives seems to be a "substantial reduction in the secondary movements of irregular migrants". As previously identified in this study, the actual extent of these 'movements' is unclear, as is the extent to which these may be putting 'internal security' and 'public policy' at risk. Secondly, it is neither clear how initiatives such as the European Border and Coast Guard (EBCG), the temporary relocation scheme (including in its new guise under the 'corrective mechanism' in the latest Dublin system re-cast proposal) or the EU-Turkey Statement would be capable of preventing people from moving within the Schengen Area, in particular if they have the legitimate aim to do so. Thirdly, if we speak about numbers of asylum seekers, Eurostat shows that the numbers of first-time asylum applicants have dropped significantly since December 2016 (see Figure 3). This has been especially so since April when the EU-Turkey Statement came into effect and the 'Balkans route' was closed off completely. Despite such evidence of a 'substantial reduction' in the numbers of people arriving, MS have acknowledged in their own notifications that they continued internal border controls due to 'fears of secondary movements'. Such unsubstantiated fears have so far gone unchallenged by the Commission's proportionality assessment. Thus, it is not clear whether and how "Back to Schengen" agenda, that made its success conditional on the adoption and implementation of these EU plans, is capable of addressing the 'fears of the MS'.

1.4. Methodology

This study assesses whether the 2016 Schengen governance area is crisis-proof. It aims to provide a comprehensive understanding of the implementation dynamics and challenges affecting the current Schengen governance framework in light of recent developments and in response to the European refugee crisis.

The legal analysis focuses on appropriate, proportionate and effective implementation of the SBC provisions on the temporary reintroduction of internal border controls by Member States and the proper functioning of the Schengen evaluation and monitoring mechanism. The study aims to:

1. Provide a brief account of the legal, social, political and economic developments that led to the reintroduction of the EU's internal borders.

²⁰ European Commission (2016), *Proposal for a Council Implementing Decision setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk*, COM(2016) 275 final, Brussels, 4.5.2016.

2. Identify and map the main changes in the Schengen governance framework due to the 2013 Schengen governance reform.
3. Analyse the implementation of the Schengen governance framework and to give an account of the current state-of-play, including Member State compliance and non-compliance with the Schengen Borders Code.
4. Assess whether the current Schengen governance framework, which encompasses the Schengen Borders Code and Schengen evaluation and monitoring mechanism, is 'fit for purpose' and 'crisis proof'.
5. Suggest concrete policy recommendations to improve and amend the legal, policy and political methods of Schengen governance.

In order to meet these objectives, this study has adopted a legal and policy analysis approach that comprises desk research of relevant primary and secondary sources. This analysis has been combined with a set of semi-structured interviews with a selection of EU policymakers in Brussels, comprising representatives from all relevant European institutions, a selection of EU Member State representatives and EU agencies. The interviews were of particular importance in the context of the rapid development of related policies. Moreover, the findings of the study were verified in a stakeholders' discussion organised by the European Citizens Action Service (ECAS). The discussion added additional dimensions on EU citizens' concern, mainly youth concerns, on free movement guarantees when border controls are reintroduced at internal borders (see Annex 4).

1.5. Structure of the study

This study sets out to provide a better understanding of the legal implications of the reintroduction of internal borders in the EU and explores the policy processes underlying Member States' and EU institutions' actions in this context, and the legality of them. It aims to explore the options for strengthening the role of the European Parliament (EP) in ensuring democratic accountability at a time when the application of the SBC is in question.

Section 2 aims to explain how The Franco-Italian affair in 2011 opened up important discussions for ensuring 'more Europe' in Schengen governance.²¹ This led to the Schengen governance reform in 2013, which was tested in the 2015/16 European refugee crisis.

Section 3 maps the main innovations introduced in the 2013 Schengen governance reform. The 2013 legislative reform positioned the European Commission at the centre of the Schengen evaluation system and included 'more EU' in the monitoring and scrutiny powers. The Schengen Evaluation Mechanism (SEM) moved beyond the previous inter-governmental system. For example, the new SBC included amendments concerning the conditions for reintroducing internal border checks and deterrence mechanism – Article 29.²² A new consolidated version of the SBC was recently published on 23 March 2016.²³ Finally, the section points out that, whereas greater parliamentary scrutiny is to be regarded an achievement and, under the new confidentiality rules MEPs can access relevant evaluation documents, practical arrangements still limit parliamentary scrutiny.²⁴

²¹ Peers, S. (2013), *The Future of the Schengen System*. Swedish Institute for European Policy Studies, (SIEPS), Report No. 6, Stockholm, November 2013.

²² European Union (2013), 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, OJ L 295, p. 27–37, Brussels, 6.11.2013. (Further - SEM).

²³ European Union (2016), Regulation 2016/339 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ L 77, Brussels, 23.3.2016. (Further - SBC).

²⁴ European Parliament and Council (2014), *Interinstitutional agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy*, OJ C 95, Brussels, 01.04.2014, p. 1 – 51.; European Parliament and European Commission (2010), ANNEX II,

Sections 4 and 5 provide a legal analysis of the practical application of the SBC and SEM. Section 4 analyses the consistency and proportionality of the grounds invoked by the Member States (MS) that have reintroduced internal border controls. Thus, Section 4 assesses Member States' compliance with the SBC and the legality of exceptions to the internal border-free area. Detailed Member State notifications and subsequent reporting can be found in Annex 3. Section 4 also analyses the MS responses beyond the scope of the SBC, such as fences at internal borders or informal practices of 'systematic police checks' in border areas.

Section 5 provides a detailed overview of the application of the SEM mechanism on internal and external borders and it also sheds light on infringement procedures initiated by the Commission against MS. Equally, the Section maps out the important agencies involved in the SEM mechanism and touches upon recent developments, such as the move to entrust a 'vulnerability assessment' to the future European Borders Coast Guard (EBCG) and the new initiatives regarding the European Asylum Support Office (EASO). The Section also stresses the role of the EU Fundamental Rights Agency (FRA) when evaluating internal and external borders.

Section 6 of the study concludes that Schengen is fit for purpose and here to stay, though many gaps and open questions still need to be addressed. Recommendations are made as to how to go about dealing with the deficiencies identified.

2. SCHENGEN AND 'CRISES': A BRIEF BACKGROUND

KEY FINDINGS

- The temporary reintroduction of internal border checks has been used on several occasions by EU Member States in the past.
- During the 2010-2011 Arab Spring and the 2015-2016 European refugee crisis, the reintroduction of internal border controls was related to the arrival of asylum seekers, on both occasions raising concerns about the future of Schengen
- Following the Franco-Italian affair in 2011, the Schengen Governance Package was adopted in order to move beyond the previous inter-governmental methods and ensure a more Community-based approach in the implementation and evaluation of Schengen rules by EU Member States.
- The European Parliament gained important scrutiny powers over the results of Schengen evaluations as a result of the so-called "Schengen freeze".

This Section provides a brief overview of the development of the Schengen Area, followed by an overview of earlier reintroductions of internal Schengen border checks. Finally, the section provides the background to the 2013 legislative reform of the Schengen Borders Code (SBC). Particular attention is paid to the Franco-Italian Affair in 2011 that related to the arrival of Tunisian migrants in the wake of the so-called 'Arab Spring'. The 2013 Schengen Governance Package was the main EU policy response to settle the Franco-Italian controversy by injecting 'more EU' into the evaluation of the Schengen system and the monitoring of the reintroduction of internal border checks by national governments. The corresponding legislation was adopted in October 2013, but not until a dispute over the role of the European Parliament in the adoption and monitoring of the Schengen evaluation mechanism had been settled.²⁵

2.1. Brief overview of the Schengen Area

The free movement of persons is one of the four fundamental freedoms of the European Union, part of the original treaties and enhanced in the 1987 Single European Act. The abolition of border controls on the movement of persons among the Member States of the EU was determined to be an integral part of the completion of the internal market, a part of Jacques Delors' 1992 project. However, a number of Member States have been reluctant to abolish intra-EU Member State controls and, from the adoption of the Single European Act it was clear that there would be difficulties with implementation. Two Member States in particular - Ireland and the UK - stood in opposition to the abolition of intra-Member State border controls.

Five of the six original Member States of the EU (the outlier was Italy) addressed the issue of intra-Member State border controls in a bold move outside the EU framework - the 1985 Schengen Agreement. This agreement laid the foundations for the abolition of border controls on persons moving among those five states, independently of the EU internal market. The Schengen Agreement was primarily a response to industrial action by lorry drivers on the Franco-German border, but the security implications were quickly picked up by the Ministries of the Interior (MoI). The latter became centrally involved. One of the key issues to be

²⁵ European Union (2013), 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, OJ L 295, p. 1 -10, Brussels, 6.11.2013.

resolved were the compensating measures for the abolition of border controls. These included common rules on the external border, common rules on visas and the countries to which they applied, a wide range of measures in policing and a database.

The Schengen Agreement was supplemented by the Schengen Implementing Convention in 1990, which set out the nuts and bolts of the system and paved the way for the lifting of intra-participating state border controls on persons on 25 March 1995 (with an exception for France which was still concerned about the Dutch soft drugs policy). In the meantime, the completion of the internal market and the abolition of border controls among Member States for the free movement of persons was stalled, not least as a result of a conflict between the UK and Spain over the status of Gibraltar. However, all the Member States, other than the UK and Ireland, ultimately joined the Schengen system, creating a complicated and uncertain legal system between the EU and an agreement among many Member States covering the same territory as the EU treaties.

This was resolved by the Amsterdam Treaty in 1999 when the Schengen *acquis* was incorporated into the EU treaties and a lengthy procedure of transition took place to bring Schengen into the core of EU law. One of the issues that would trouble the system was the status of CISA - did this agreement have a continuing legal life after the incorporation of 'Schengen' into EU law or had its value been exhausted? This uncertainty would give rise to conflict between France and Italy in 2011, which will be discussed below. That source of friction was resolved by the 2013 changes to the Schengen rules on intra-Member State controls on persons, which is discussed later in this study.

The close connection of intra-Member State border controls on persons and security has always been a major concern of the interior ministries of a number of Member States. The apparent loss of control over the movement of persons has often been presented as a source of instability for some Member States, hampering the proper operation of their activities to protect the state and its citizens. This has not been the position of all Member States by any means but it does represent a current in the Schengen debate, which must be acknowledged. The refugee crisis in 2015-16 and the decision of some Member States to reintroduce internal border controls in response, is part of that long tale of security concerns about the border-control-free area. This study seeks to examine those moves and practices in light of the relevant legal requirements and place them in context for critical appreciation.

Table 1: Categories of the Countries in the Schengen Area

Schengen Area (26)	EU Schengen States (22)	Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden
	Non-EU Schengen states (4)	Iceland, Norway, Switzerland, Liechtenstein
Non-Schengen, but EU (6)	Schengen candidate countries (4)	Croatia*, Romania, Bulgaria and Cyprus**
	Non-Schengen EU States (2)	UK and Ireland

* Croatia – is still considered as a newcomer thus not fully integrated, for example, in the SIS II system;

**Cyprus applies Schengen *acquis* with the exceptions of SIS and absence of internal border controls and visas.

Source: Authors based on the Commissions' official information.²⁶

²⁶ See European Commission Website, "Schengen Area" at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm.

The Schengen Area is now composed of 26 EU and non-EU Schengen States, while some of the EU states have either opted out intentionally or are in the process of accession to the Schengen Area (see Table 1 above).

The Schengen Area countries are bound by the rules of the SBC. The former SBC was codified already in 2006,²⁷ though only in March, 2016 the consolidated version appeared.²⁸ The table below indicates how the numbering of the relevant articles has changed. The later in this study references are made to the newest version.²⁹

Table 2. Relevant Schengen Borders Code articles for re-instating internal border controls

New Article (Regulation (EU) 2016/399)	Former Article (Regulation (EC) 562/2006)	Procedures and measures	Duration of controls
Article 25	Article 23	General framework for the temporary reintroduction of border control at internal borders	Timelines, in accordance with Articles 27, 28 or 29.
Article 26	Article 23a	Criteria for the temporary reintroduction of border control at internal borders	N/A
Article 27	Articles 24	Procedure for foreseeable events (regular procedure): Advance notice to other MS and EC	Up to 30 days or "for the foreseeable duration of the serious threat" if longer; Renewable for periods of up to 30 days up to a maximum of six months
Article 28	Articles 25	Cases requiring urgent action (emergency procedure): Immediate (unilateral) action without prior notification by the MS	Up to 10 days; Renewable for periods of up to 20 days, up to a maximum of two months
Article 29	Articles 26	Prolonging border control at internal borders (prolongation procedure): Council recommends (on the basis of a Commission proposal) that one or more MS should reintroduce controls.	Up to six months, renewable three times up to a maximum of two years

Source: Authors.³⁰

²⁷ European Communities (2006), *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 of 2006)*, OJ L 105, p. 1–32. Brussels, 13.4.2006,

²⁸ European Union (2016), *Regulation (EU) 2016/399 of The European Parliament and of The Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification)*, OJ L 77, p.1-52. Brussels, 23.3.2016.

²⁹ Except for the Annex 3, where the MS notifications are analysed

³⁰ The table is based on the SBC of 2006 (Regulation (EC) 562/2006) and SBC consolidated version of 2016 (Regulation (EU) 2016/399).

2.2. The reintroduction of internal border checks

The list of Member State notifications based on Article 25 (formerly 23) of Schengen³¹, up to 2006, shows that the reintroduction of internal border controls was used among the Member States on various occasions, from important high-level meetings (e.g. G7, World Economic Forum, NATO Summit, Nobel Prize ceremonies, visits of the Pope), to celebrations of controversial groups (e.g. the 50th anniversary of ETA, Youth days of radical young Basques) to responses to terror acts (e.g. the Breivik attacks in Norway on 22 July 2011).

The reintroduction of internal border controls due to large numbers of people in need of humanitarian protection arriving in the EU in 2011 and 2015 provoked starkly different reactions. Prior to this, there was only one instance in 2001 where migration had been linked with reintroducing internal border checks: i.e. when Belgium reintroduced border controls for two weeks due to "the risk of a sudden temporary increase in asylum seekers."³² The two cases have revealed the "limits and unfinished elements of the EU's immigration policy" and the need to subject EU Member States' decisions to derogate the border control-free area to more EU scrutiny.³³ Thus, the explanatory memorandum for the 2011 Commission Proposal for new common rules on the temporary reintroduction of border control at internal borders in the exceptional circumstances of September 2011³⁴ included Article 26 (former Article 23a), which clarified the criteria for Member States reintroduction of internal border control in compliance with EU law.³⁵

2.3. The 2011 Franco-Italian affair: Was there a breach of the Schengen Borders Code?

In April 2011, following the Arab Spring revolutions, in total around 50,000 North African refugees from Tunisia, Libya and Egypt arrived in Italy.³⁶ On the basis of a 5 April decree, Italian authorities issued six-month temporary residence permits on humanitarian grounds, mainly to Tunisians who arrived in the period between 1 January and 5 April 2011.³⁷ The Italian government later estimated that 24,854³⁸ such permits were issued. The residence permits gave an automatic right to move freely in the Schengen zone, thus many Tunisians started to head towards France, where they had some family links or at least knew the language.

France responded to the Italian act by introducing border checks on Tunisian migrants and blocking a train that carried hundreds of migrants at the border.³⁹ Austria, Belgium and Germany expressed their concerns, but refrained from re-introducing border checks. In addition, the Netherlands threatened to deport all Tunisians arriving from Italy. Whereas Italy claimed that it was being left alone to deal with asylum-seekers,⁴⁰ the main argument put

³¹ The list of Member States' notifications compiled by European Commission can be accessed here: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf.

³² Statewatch (2003), *Statewatch European Monitor*, Vol. 3. No.4, February 2003.

³³ S.Carrera, E.Guild, M.Merlino and J.Parkin (2011), "A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair", CEPS paper in *Liberty and Security in Europe*, April 2011, p. 3.

³⁴ European Commission (2011), Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, COM/2011/0560 final.

³⁵ In the newly codified Regulation (EU) 2016/399, Article 23a is replaced by Article 26.

³⁶ "Extension of humanitarian residence permits to put an end to "emergency" - problems including "disappeared" Tunisians and rightless refugees from Libya persist", *Statewatch.org*, June, 2012. <http://www.statewatch.org/news/2012/jun/02italy-libya.htm>.

³⁷ E. Vallet (2016), *Borders, Fences and Walls: State of Insecurity?*, Routledge.

³⁸ A government estimate number of August 2011, found in "Extension of humanitarian residence permits to put an end to "emergency" - problems including "disappeared" Tunisians and rightless refugees from Libya persist" , *Statewatch.org*, June, 2012 <http://www.statewatch.org/news/2012/jun/02italy-libya.htm>.

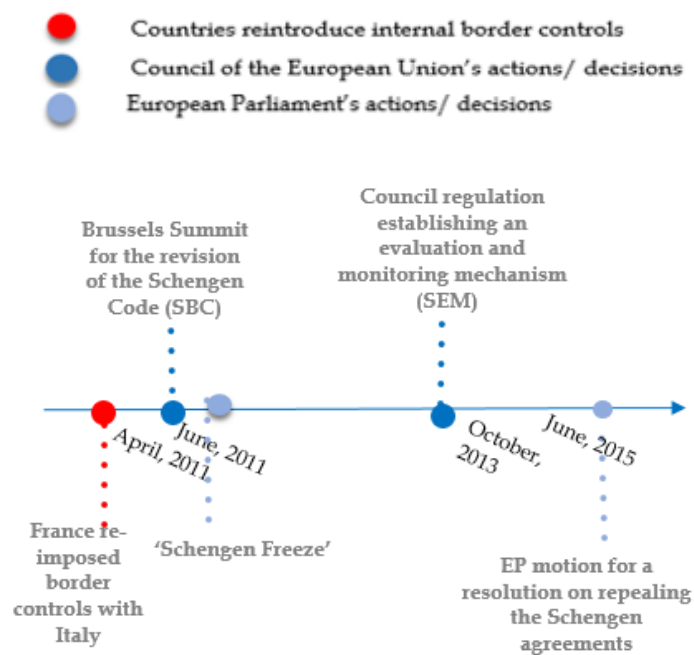
³⁹ S.Carrera, E.Guild, M.Merlino and J.Parkin (2011) "Race against Solidarity: The Schengen Regime and the Franco-Italian Affair", CEPS paper in *Liberty and Security in Europe*, April 2011.

⁴⁰ See V. Pop, "Italian minister questions value of EU membership", *EUobserver.com*, 11 April 2011

by France was that not all the entry criteria for Third Country Nationals had been met, in particular “sufficient means of subsistence” for Tunisian migrants throughout the residence period, as laid down in Article 5.1 of the Schengen Borders Code.

In its first reactions, the Commission seemed to side with the French government and to claim that humanitarian residence permits should not result in an automatic right to travel.⁴¹ Afterwards it assessed the legality of the actions of both the French and Italian governments. The Commission came to the conclusion that both states were in compliance with the EU law and that only “the spirit of the Schengen rules” had been violated.⁴² Interviews conducted for the purposes of this study have confirmed that the spirit of Schengen means that ‘everyone’, once inside the external Schengen border, including Third Country Nationals and regardless of their status, has the right to circulate freely within the Union without being checked.⁴³

Figure 5. Schengen Internal Borders: Developments April 2011 – June 2015



Source: Authors.

It has been argued that the Commission missed the opportunity to establish a clear benchmark for defining the ‘spirit’ by assessing compliance with the principles of solidarity, loyal cooperation and fundamental rights.⁴⁴ The Italian action violated the principle of

(<http://euobserver.com/22/32155?print=1>).

⁴¹ See European Commission Website, *Midday Press Briefing of 18 April 2011*, URL: <http://ec.europa.eu/avservices/player/streaming.cfm?type=ebsvod&sid=178405>.

⁴² “From a formal point of view steps taken by Italian and French authorities have been in compliance with EU law. However, I regret that the spirit of the Schengen rules has not been fully respected.” European Commission (2011), “Statement by Commissioner Malmström on the compliance of Italian and French measures with the Schengen acquis”, MEMO/11/538, Brussels, 25.07.2011.

⁴³ Explanation of the meaning of the “Spirit of Schengen” given during an interview with DG HOME, European Commission, 17.05.2016, Brussels.

⁴⁴ S.Carrera (2012), “An Assessment of the Commission’s 2011 Schengen Governance Package: Preventing abuse by EU member states of freedom of movement?”, CEPS paper in *Liberty and Security in Europe*, No.47, March 2012. See also Basilien-Gainche, M.L. (2011), *La Remise en Cause des Accords de Schengen*, CERISCOPE, 2011

"sincere and loyal cooperation", as the intended public policy goal was to encourage Tunisians to leave the country, which is more relevant than mere 'application of entry criteria'.⁴⁵ On the other hand, French action was probably disproportionate, going beyond what was "strictly necessary".⁴⁶ In this light, the European Commission, instead of launching infringement procedures against both States, started deliberations regarding the strengthening of the Schengen governance framework, which aimed to inject "more Europe" in governing Schengen borders.

2.4. The substance of the 2013 Schengen governance reform

After the Franco-Italian affair the European Commission aimed to halt previous 'unilateral' decisions to re-instate internal borders by Member States and to insist on more Europe. The Commission proposal was based on the presumption that the security of external borders is a precondition for the freedom of circulation in the EU.⁴⁷ In its communication accompanying the proposal to revise the SBC, the European Commission stressed the need to ensure that the Schengen area can cope effectively with *strains* which may be placed on it by weaknesses at its *external borders* or by external factors beyond its control".⁴⁸

The Commission proposal was echoed by the call from the 23-24 June 2011 European Council to consider the introduction of a "mechanism [...] to respond to exceptional circumstances putting the overall functioning of Schengen cooperation at risk" that would enable support to, as well as monitoring of, "a Member State facing heavy pressure at the external borders" and a "safeguard clause [...] 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".⁴⁹ The proposal provided that the suspension of free movement should be automatic, should the Member States at the external borders fail in carrying out their obligations. Already at that time, the confidential risk analyses carried out by Frontex and Europol framed migration and asylum as sources of insecurity.⁵⁰

By contrast, the European Parliament resolution of 7 July 2011 stressed that "the necessary conditions for the temporary reintroduction of internal border controls in exceptional circumstances are *already* clearly set out" in the SBC and stated that any initiative from the Commission would first be "aimed at defining the strict application" of existing provisions, without introducing "any new additional exemptions".⁵¹ In addition, in the same resolution, the European Parliament argued that "the crossing of external borders by non-nationals should not be framed as a 'threat' to public policy and internal security."⁵² Thus, in the end, recital 26 of the SBC stated that "migration and the crossing of external borders by a large number of third country nationals should not, *per se*, be considered to be a threat to public policy or internal security."

Frontieres website (<http://ceriscope.sciences-po.fr/content/part2/la-remise-en-cause-desaccords-de-schengen>) and Wastl-Walter, D., *Borders, Fences and Walls: State of Insecurity?*, Ashgate Publishing Ltd., 2014.

⁴⁵ S.Carrera, E.Guild, M.Merlino and J.Parkin (2011), "A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair", CEPS paper in *Liberty and Security in Europe*, April 2011, p. 18.

⁴⁶ *Ibid.*, p. 19.

⁴⁷ S.Carrera (2012), "An Assessment of the Commission's 2011 Schengen Governance Package: Preventing abuse by EU member states of freedom of movement?", CEPS paper in *Liberty and Security in Europe*, No.47, March 2012.

⁴⁸ European Commission (2011), *Schengen governance – strengthening the area without internal border control*, COM(2011) 561 final, Brussels, 16.9.2011, p. 2.

⁴⁹ European Council (2011), *European Council 23/24 June 2011 – Conclusions*, EUCO 23/1/11, Brussels 29.9.2011, p. 8.

⁵⁰ S.Carrera (2012), "An Assessment of the Commission's 2011 Schengen Governance Package: Preventing abuse by EU member states of freedom of movement?", CEPS paper in *Liberty and Security in Europe*, No.47, March 2012.

⁵¹ European Parliament (2011) *Resolution of 7 July 2011 on changes to Schengen*, P7_TA(2011)0336, Strasbourg 7.7.2011.

⁵² S.Carrera (2012), "An Assessment of the Commission's 2011 Schengen Governance Package: Preventing abuse by EU member states of freedom of movement?", CEPS paper in *Liberty and Security in Europe*, No.47, March 2012.

2.5. 'The Schengen Freeze' and the European Parliament's Role

'The Schengen Freeze' controversy arose during the negotiations on the 2013 Schengen Governance Package and related to the role played by the European Parliament in the Schengen evaluation and monitoring mechanism. After the entry into force of the Treaty of Lisbon in 2009, the European Parliament acquired new powers and the role of co-legislator of the EU's Area of Freedom, Security and Justice (AFSJ). Thus, when the Schengen governance reform was negotiated, the European Parliament fought hard for co-legislator competences in the SEM mechanism.⁵³

After two years of negotiations regarding the Parliaments role in the SEM,⁵⁴ the Danish Presidency of the Council decided to reclassify the legal basis of a proposal amending the SEM from Article 77 TFEU to Article 70 TFEU.⁵⁵ Article 77 of the TFEU provides that, in the area of border checks, asylum and immigration (Chapter 2 of the TFEU), the "European Parliament shall act in accordance with the ordinary legislative procedure" as co-legislator with the Council. Article 70, on the other hand, provides that, for ASFJ issues, the "Council may, on a proposal from the Commission, 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". Under this article the European Parliament and national parliaments are only "informed of the content and results of the evaluation". Thus, whereas Article 77 of the TFEU sees the European Parliament as the co-legislator (as is the case with the SBC), Article 70 does not provide any formal role for the Parliament.

The EP reacted in an unprecedented way, freezing relevant Justice and Home Affairs files and threatening to bring an action before the CJEU.⁵⁶ This controversy, known as the Schengen Freeze, "revealed a pre-Lisbon mind-set among member states in the Council, as did the Council's legislative amendments that significantly watered down the 'Union-focused' nature of the Schengen Governance Package".⁵⁷ The 'freeze', however, proved to be a successful factor in subsequent negotiations. While Article 70 of the TFEU remained the legal basis, the European Parliament achieved some practical co-decision powers, such as that any change to the Schengen Evaluation Mechanism should be subject to consultation with the EP.⁵⁸ Nevertheless, the new powers of the Parliament still remain under strain in the light of the latest developments in the European refugee crisis, despite the earlier Statement which explicitly stipulates that "any future proposal from the Commission for amending this evaluation system would be submitted to the consultation of the European Parliament in order to take into consideration its opinion, to the fullest extent possible, before the adoption of a final text."⁵⁹

⁵³ Carrera, S., Hernanz, N. and Parkin, J. (2013), "The 'Lisbonisation' of the European Parliament: Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice." *CEPS Paper in Liberty and Security in Europe*, No. 58, September 2013, p. 14.

⁵⁴ European Parliament (2013) Position adopted at first reading on 12 June 2013 with a view to the adoption of Regulation (EU) No .../2013 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, P7_TC1-COD(2011)0242, Strasbourg, 12.06.2013.

⁵⁵ Council (2013), Draft consolidated compromise text - Proposal for a Council Regulation on the establishment of an evaluation mechanism to verify the application of the Schengen acquis, Council Document 10273/13, Brussels, 30.05. 2013.

⁵⁶ European Parliament (2012), "EP decides to suspend cooperation with Council on five JHA dossiers until Schengen question is resolved", Press Release, 14.06.2012.

⁵⁷ Carrera, S., Hernanz, N. and Parkin, J. (2013), "The 'Lisbonisation' of the European Parliament: Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice." *CEPS Paper in Liberty and Security in Europe*, No. 58, September 2013, p. 14.

⁵⁸ See Council (2013), *Draft consolidated compromise text - Proposal for a Council Regulation on the establishment of an evaluation mechanism to verify the application of the Schengen acquis*, Council Document 10273/13, Brussels, 30.05.2013.

⁵⁹ European Parliament, the Council and the Commission (2013), Statement attached to Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the

3. MAPPING CHANGES IN THE SCHENGEN GOVERNANCE FRAMEWORK

KEY FINDINGS

- The main innovation in the revised Schengen Borders Code is Article 29, providing for the possible temporary introduction of internal borders for up to two years where there are 'serious deficiencies' at external borders.
- Under Regulation 1053/2013, the Schengen evaluation and monitoring mechanism changed from a completely intergovernmental system into one that is fully integrated into the Union system. It is run primarily by the Commission, with ample opportunities for Member States to influence the actual application of the mechanism.
- The new evaluation system began to operate *de facto* only in 2015, the year of the peak in Syrian refugees coming to the EU from Turkey via the Greek islands in the Aegean. It is too early to draw definite conclusions on the working of the new system since this case cannot be considered typical.
- The new Schengen evaluation mechanism is proactive, allowing for deficiencies and non-compliance with EU law to be detected at an earlier stage and remedied at shorter notice than on the basis of often very lengthy, reactive and adversarial infringement procedures.
- Most documents produced in the evaluation process are classified or restricted, mostly on reasonable grounds. This situation, however, severely restricts the possibilities for serious monitoring of the working of the process by the European Parliament and by national parliaments.

This section provides a legal analysis of the Schengen governance framework, before and after the 2013 regulations. Thus Section refers to the relevant CJEU case law and political negotiations that led to the increased role of the Commission and the EP and elaborates on the main innovations in the revised Schengen Borders Code (Sub-Section 3.1.) and the Schengen evaluation and monitoring mechanism (Sub-Section 3.2.). Finally, the section explores the new powers of the Commission, European Parliament and national parliaments (section 3.3.).

3.1. Innovations in the revised the Schengen Borders Code

The Schengen Borders Code (hereafter SBC) sets out the main rules governing a) the abolition of internal border controls, including the conditions and procedures for their reintroduction, and b) the uniform control of external borders. In September 2011, the European Commission proposed the first major revision to the SBC rules, **particularly with regard to Title III** on the temporary reintroduction of controls at the internal borders.⁶⁰ The revision builds on developments after the Franco-Italian crisis of 2011 (see Section 2 above).

Prior to the revisions adopted in October 2013, rules concerning internal border controls and their re-imposition were organised as follows⁶¹:

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 295/27, 6.11.2013.

⁶⁰ European Commission (2011), *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, Brussels, 16.9.2011.

⁶¹ 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), OJ L 105, 13.4.2006.

- The basic rule on the re-imposition of internal border checks appeared in **Article 25(1)** (former Article 23 (1)) SBC, stating that Member States 'may exceptionally reintroduce' border controls at their internal borders on grounds of a 'serious threat to public policy or internal security', for a period of no more than 30 days or 'the foreseeable duration of the serious threat if its duration exceeds the period of 30 days'.
- The procedure had two variants depending on whether a Member State was dealing with 'foreseeable events' under **Article 27 SBC** (former Article 24) or 'urgent cases' under **Article 28 SBC** (former Article 25). For foreseeable events, a Member State had to notify the Commission and other Member States of its plans and provide, 'as soon as possible', information on reasons, including details of the events considered to constitute a 'serious threat', the scope, dates and duration of the controls. The Commission could issue an opinion (i.e. non-binding), and the procedure further involved a 'consultation' between the Member State considering the re-imposition of controls, the other Member States and the Commission. In cases of 'urgent action', the reintroduction of controls could be immediate, other Member States and the Commission would be informed 'without delay', and provided with reasons for the use of the urgent procedure. The Commission envisaged these articles as separate procedures allowing MS to respond to different needs.⁶² Thus, it is interesting to note that, in the current Schengen crisis, the majority of MS have switched from 'unforeseen threat' to 'foreseen' and have started to apply these articles in sequence, which allows them to maintain internal border controls for 8 months in total.
- **Articles 31 and 33** (former Articles 27 and 29 respectively) covered the obligation for the Member State concerned to inform the European Parliament of the measures taken to re-impose or prolong internal border controls, and to submit a report to the European Parliament, the European Commission and the Council at the time of or after the lifting of controls. **Article 32** (former Article 28) established that, in the event that internal border controls were re-imposed, the rules of the SBC concerning external border checks would apply.
- **Article 34** (former Article 30) established the obligation to inform the public about the re-imposition of internal border controls, unless security reasons prevented it, while **Article 35** (former Article 31) specified that, if the concerned Member State requests it, the European Parliament, Commission and other Member States should keep any information supplied on the re-imposition of border checks confidential.

In October 2010, the European Commission published a report on the application of Title III, as required by the former Article 38 SBC (not in the new version).⁶³ Based on the 22 cases where Member States had re-imposed internal border controls since the entry into force of the SBC Regulation, the report found that Member States had not made use of rules on the prolongation of border controls beyond the initial 30-day period. The Commission's criticism was mostly procedural, noting that the 'timeframe [...] for issuing its opinion for the purpose of formal consultation between the Member States and the Commission is too short'⁶⁴ as far as foreseeable events (Article 27 SBC) are concerned. The information submitted was also deemed not substantial enough. No Member State except Finland had activated the confidentiality clause under Article 35 SBC (former Article 31). The Commission noted 'that in general the current legal framework governing the temporary reintroduction of border control at internal borders is sufficient'.⁶⁵

⁶² Interview with Commission, DG HOME, 17.05.2016.

⁶³ European Commission (2010), *Report 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, Brussels, 13.10.2010.

⁶⁴ Ibid, p. 8

⁶⁵ Ibid, p. 10

The conclusions of the 2010 report suggest that subsequent controversies leading to the 2013 revision of the SBC are **first and foremost related to a shift in the political context, exemplified by the Franco-Italian affair in 2011**. This shift enabled the different actors involved in the revision to push specific agendas in relation to the SBC. Any effort to determine whether the post-2013 SBC rules on the re-imposition of internal border controls constitute an innovation in this respect should take stock of the priorities placed in the foreground by the different actors in the legislative process.

The position of the **European Commission** can be found in the legislative proposal of October 2011, the key aspects of which are the following:

- It wanted a **replacement of most of the rules found in Title III**, concerning in particular the re-imposition of internal border controls, which would have shifted most of the power to decide from the Member States to the European Commission.⁶⁶
- This involved strengthening the necessity criteria for the re-imposition of internal border controls, by means of a **new Article 26** (former Article 23a) SBC, taking into account 'in particular' (not exclusively) threats at the 'Union or national level', the existence and availability of 'support measures' at the national or Union level, as well as 'the likely impact of such a measure' on free movement within the Schengen area.
- The **new Articles 27 and 28** would have required that Member States make a request to the European Commission for the purpose of re-imposing controls, six weeks prior to the planned reintroduction in the case of 'foreseeable events' under Article 27. The request would have included 'all relevant data', echoing the findings of the 2010 Commission report on the application of Title III SBC, and this information would also have been submitted to the European Parliament. In cases falling under Article 27 SBC, the proposed legislation provided that **the decision to re-impose border controls would be taken by the European Commission through 'implementing acts'** in combination with a new **Article 38** SBC (former Article 33a). For Article 28 requests, the European Commission would have held sole power to decide on the prolongation of controls.
- The proposal put forward a new **Article 29** addressing '*cases of persistent serious deficiencies*' in the way a Member State controls its segment of EU external borders or handled its return procedures. Where, through procedures detailed in the regulation on Schengen evaluation, deficiencies were detected and these deficiencies constituted 'a serious threat to public policy or internal security at the Union or national level', internal border controls were to be reintroduced for six months, to be extended for up to three further consecutive periods of six months if the Member State concerned did not take remedial action. The exclusive power to make decisions would rest with the European Commission. Interviews revealed that initially it was envisaged that Member States geographically located just inside the one with the 'persistent deficiencies' would act as a new 'external border' for the period until the deficiencies were solved.

By contrast, the **Council's position**⁶⁷ consisted in locating most of the decision powers on the re-imposition of internal border controls with the Member States. Three points are noteworthy:

- A new **Article 21** (now Article 19a) giving the European Commission power to issue recommendations to a Member State if a Schengen evaluation found 'serious difficulties or deficiencies' associated with external border controls. The recommendations could be blocked by the Council, and their implementation would have been monitored by the Commission reporting to a committee of Member State officials.

⁶⁶ Peers, S. (2013) *The Future of Schengen*. Stockholm: SIEPS, Report No. 6, November 2013, p. 31.

⁶⁷ Presented and examined in: Peers, S. (2012), *Amending the EU's Border Code*, Statewatch Analysis No 180, London, June 2012 (2nd version). URL: <http://www.statewatch.org/analyses/no-180-schengen-border-code.pdf>

- **Articles 27 and 28:** the Council's version would have left the power to decide over the reintroduction of internal controls and their prolongation entirely in the hands of the Member States, thus reversing the logic of the Commission's initial proposals. The rules adopted under the initial SBC for the Commission to issue an opinion would have remained, as they were under Article 27, and in Article 28 the general rules for Commission opinions and Member State consultations would have applied.
- **Article 29:** the Council supported the principle of an entirely new provision in the SBC that would have applied 'in cases of persistent serious difficulties or deficiencies' in a Member State's external border control or return policy. In contrast with the European Commission's initial proposal, Member States would have retained sole power for deciding on the reintroduction of border controls. The Council's version of the new Article 29 SBC also provided that the Council itself would 'as a last resort and as a measure to protect the common interests' of the Schengen area, and if all other measures failed to have an effect, have the power to recommend that a Member State (or several of them) re-impose internal border controls.

Finally, the **European Parliament's** position on the revision⁶⁸ largely aligned with that of the Council insofar as it aimed to limit the scope of the Commission's powers to decide on or prolong the reintroduction of border controls.⁶⁹ Nevertheless, the position of both institutions diverged significantly over whether the Commission or the Council should have the upper hand in the context of the new procedure for reintroducing internal border controls on the 'serious deficiencies' ground.

Given the expectations and controversies, then, to what extent is the post-2013 version of the SBC new or innovative? The following key changes can be flagged:

- **A new Article 21** (former Article 19a), to which the European Parliament agreed without amending the Council text. The article empowers the European Commission to make recommendations to Member States addressing serious deficiencies in carrying out external border controls identified in a SEM on-site mission.
- **The re-imposition of border controls has been reaffirmed as a measure of 'last resort'** following amendments from the European Parliament.
- **A new 'serious deficiencies' ground:** The key amendment here to the Council's version of the legislation was the requirement for it to act on a proposal from the Commission when making a recommendation to Member States. The Commission can no longer make a decision on its own in this area, as provided for in its original proposal. **Article 29** also provides for a procedure whereby a Member State may decide not to go along with the Council's recommendation, requiring the concerned Member State to communicate its reasons for not doing so in writing to the European Commission, which is then tasked with providing an assessment report examining the decision against the 'common interest' of the Schengen area.

The extent to which these changes constitute an innovation, however, is unclear. As other analyses have noted, the procedures that Member States must follow to re-impose internal border controls on grounds that had already been specified in the 2006 SBC **have not been impacted significantly**, although the 2013 revision introduces 'more detailed rules on

⁶⁸ European Parliament (2012), Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances (COM(2011)0560 – C7-0248/2011 – 2011/0242(COD))
Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Renate Weber, P7_TA(2013)0259, Brussels, 14.06.2012.

⁶⁹ Peers (2013), *The future of Schengen*, op.cit., p. 41.

criteria and time limits'.⁷⁰ Likewise, while there is the new ground of 'serious deficiencies' for re-imposing border controls, it cannot be construed as a unilateral power for Member States, as any reintroduction of internal border controls still requires a recommendation from the Council, and a proposal from the European Commission. In the meantime, the 2013 revision increased the accountability of the Member States *ex post factum*, by establishing more detailed criteria for their reports on the re-imposition of border controls, affirming the possibility of a Commission opinion on those reports and a requirement for the Commission to produce yearly reports on the Schengen system. In this regard, it is important to take stock of the changes made to the Schengen evaluation and monitoring system, which are detailed in the next section.

3.2. Changes in the Schengen Evaluation and Monitoring Mechanism

This sub-section provides a historical overview of developments in the Schengen Evaluation Mechanism from 1999 until its entry into force in 2015.

3.2.1. Schengen evaluation 1999-2014

Three years after the Schengen Implementing Agreement (CISA) became operational and controls at internal borders had to be abolished in the first seven Member States in 1995, the Schengen Executive Committee in 1998 adopted a Decision establishing a Standing Committee. The committee was composed of high-ranking officials of the Schengen States. They were entrusted with evaluating the implementation of the Schengen rules in the States where the CISA entered in force. According to that decision, the sole responsibility for checking the proper application of the CISA "shall continue to remain with the Schengen States".⁷¹ After the integration of the Schengen *acquis* into Union law in 1999 this mechanism continued to operate for fifteen years (1999-2014). The Council took over the role of the Schengen Executive Committee. The Commission participated as an observer in the Council's working group on Schengen evaluation and in the expert teams that made the on-site visits.⁷² In the Hague Programme of 2005, the Commission was invited to present a proposal supplementing the existing Schengen evaluation mechanism. The long battles between the Commission and the Member States on the division of competences in the new evaluation system and, after the entry into force of the Lisbon Treaty, with respect to the role of the Parliament, are reflected in three subsequent proposals on this issue presented by the Commission in 2009, 2010 and 2011 and in the final text of the Regulation.⁷³

3.2.2. Main elements of Regulation 1053/2013

The Regulation codified and developed many of the elements from the previous evaluation system. It provides for annual (or more frequent) planning of the evaluation of the situation in Member States on the basis of visits by teams of representatives from the Commission and experts from the Member States and Frontex. Each Member State is evaluated at least once in five years.⁷⁴ These visits are to be prepared on the basis of risk analyses by Frontex and of information produced by Member States in response to a standard questionnaire. The visits result in evaluation reports that are discussed with the Member State concerned. If

⁷⁰ Peers (2013), *The future of Schengen*, op. cit., p. 44.

⁷¹ Executive Committee (2000), Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH/Com-ex (98)26 def.), OJ 2000 L 239 of 22.9.2000 p. 138-143.

⁷² Council (2014), *The legacy of Schengen evaluation within the Council, concluding on fifteen years since Schengen integration into the EU*, Council document 14374/14/REV1 of 14.11.2014.

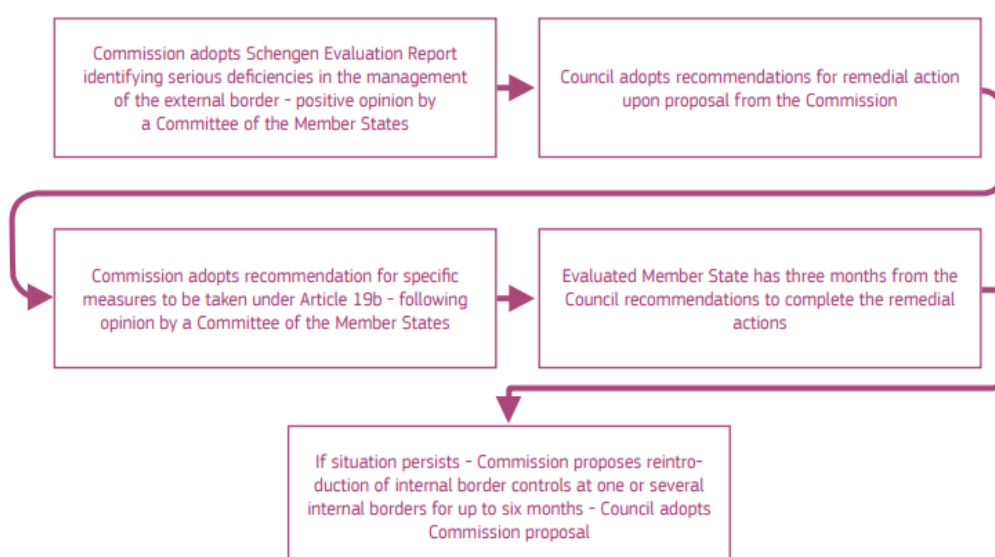
⁷³ See recital 11 of European Union (2013) Regulation 1053/2013. On the prolonged negotiations and their outcome see: S. Carrera, (2012) "An Assessment of the Commission's 2011 Schengen Governance Package," Op.cit.; Y. Pascouau (2013), "The Schengen Governance Package: The subtle balance between Community method and intergovernmental approach," EPC Discussion Paper of 12 December, 2013; M. Novotná (2015), "The Schengen Governance Package – another missed opportunity?" IES Policy Brief 2015/1, February 2015.

⁷⁴ Article 43(2) Schengen Borders Code (Regulation 2016/399).

deficiencies are identified during the evaluation, the report will contain draft recommendations for remedial action. The Council, on the basis of a proposal from the Commission, will adopt recommendations for remedial action to redress the weaknesses; 16 proposals for such recommendations are mentioned in the Commission's register of documents from September 2015 until mid June 2016.⁷⁵

The Member State has to provide (within three months) an action plan on how to remedy the deficiencies identified and report to the Commission on the implementation of the plan within six months. The Commission makes an assessment of the adequacy of the plan and its implementation. In case of serious deficiencies, the Commission may schedule (un)announced on-site visits to check up on the implementation of the action plan (see Figure 6 below).

Figure 6. Schengen evaluation mechanism evaluation in relation to Article 29



Source: European Commission website (2016).⁷⁶

It is worth noting, however, that the current scheme will be changed by incorporating the new EBCG vulnerability assessment (see Sub-section 5.2.2.). The evaluation mechanism covers all areas of the Schengen *acquis*, such as borders, visa policy, the Schengen Information System (SIS II), data protection, police cooperation, judicial cooperation in criminal matters and drugs policies. It covers both the efficiency of controls at external borders and the absence of controls at internal borders.⁷⁷ The repeated references in the Schengen Border Code to Regulation 1053/2013 illustrate the close link between the two instruments.⁷⁸

⁷⁵ None of these proposals was accessible to the public:

<https://ec.europa.eu/transparency/regdoc/?fuseaction=list&n=10&adv=0&cotelId=&year=&number=&version=F&dateFrom=&dateTo=&serviceId=&documentType=&title=1053%2F2013&titleLanguage=&titleSearch=EXACT&sortBy=NUMBER&sortOrder=DESC>, accessed on 13 June 2016. Only the proposal on the consequences of the serious deficiencies at the external borders of Greece was published - see European Commission (2016), Proposal for a Council Implementing Decision setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, COM(2016) 275 final, Brussels, 4.5.2016.

⁷⁶ European Commission Website (2016), "The Schengen Rules Explained", URL: http://ec.europa.eu/dqs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/the_schengen_rules_explained_20160210_en.pdf

⁷⁷ Recitals 1 and 13 of the SEM Regulation.

⁷⁸ In Recitals 29, 30 and 33 of Schengen Borders Code (SBC) and in Articles 21(3), 39(1)(b), 43(2), (3) and (5) of the SBC.

3.2.3. Main differences between Regulation 1053/2013 and the 1998 Decision

The seven main differences between the old and the new evaluation mechanism are:

- The new mechanism is more clearly structured, including a serious follow-up mechanism for monitoring the implementation of recommendations by Member States. They need to draft ex post reports - the lack of systematic follow-up was a weak point in the old system;
- The Commission's role has changed from observer to overall organiser and coordinator of the evaluations;
- Expertise of other EU institutions and bodies, such as Frontex, Europol, Eurojust, EASO and EDPS may be used. They can participate as observers in the on-site missions;
- The Commission is now entitled to schedule unannounced on-site visits in Member States;
- The evaluation and on-site-visits may also cover the absence of border control at internal borders;
- The European Parliament is now entitled to receive the relevant information (draft and final evaluation reports, recommendations that are classified as "EU restricted") and may influence the practice of the evaluation system;
- More information on the application of the Schengen evaluation is in the public domain.⁷⁹

The main achievement is that the new Regulation replaced a fully intergovernmental evaluation system with a system that clearly functions within the EU, supplementing existing mechanisms for detecting non-compliance with Union law and providing for action to ensure compliance by Member States. The earlier "inter pares" system lacked "teeth" as Member States were reluctant to openly criticise each other.⁸⁰ The current system has been criticised, mainly, by Member States, stating that the Commission is taking too much of a "top-down" approach.⁸¹

3.2.4. Regulation's entry into force in 2015

The Regulation was adopted in October 2013. It provided for the first annual and multi-annual evaluation programme to be established by the Commission in May 2014 and for the first annual plan to cover the last five weeks of 2014 only.⁸² During 2014 the evaluations were still conducted on the basis of the 1998 Decision.⁸³ The focus was on preparation of the evaluation cycle and developing training for the evaluation experts.⁸⁴ The annual evaluation programme for 2015 was established by the Commission in November 2014, which included both announced and unannounced (in the unpublished part of the programme) on-site visits.⁸⁵ The first evaluations under the Regulation (in Austria, Belgium and Sweden) were

⁷⁹ E.g. European Commission (2015) Report from the Commission to the European Parliament and the Council, *Seventh bi-annual report on the functioning of the Schengen area 1 November 2014 - 30 April 2015*, COM(2015)236, Brussels, 29.5.2015; European Commission (2016), Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016) 85 final, Brussels, 10.2.2016; European Commission (2016), *Back to Schengen - A roadmap*, COM(2016)120, Op.cit.; European Commission (2016), Assessment of Greece's Action Plan to remedy the serious deficiencies identified in the 2015 evaluation on the application of the Schengen acquis in the field of management of the external border, COM(2016) 220 final, Strasbourg, 12.4.2016; European Commission (2016), *Proposal for a Council Implementing Decision setting out a recommendation for temporary internal border control in exceptional circumstances*, COM(2016) 275 final, Op.cit.

⁸⁰ Interview with MEP, 01.06.2016 and interview with the EP LIBE Secretariat, 03.06.2016.

⁸¹ Interviews with Permanent Representations of Greece, Germany and Slovenia, on 13.05.2016, 27.05.2016 and 31.05.2016 respectively; also interview with the Council secretariat, 19.05.2016.

⁸² Articles 5(5) and 6(5) of the SEM (Regulation 1053/2013); all further references in this section are to this Regulation, unless otherwise specified.

⁸³ The last sentence of Article 23 of the SEM.

⁸⁴ European Commission (2015) *Seventh bi-annual report on the functioning of the Schengen area 1 November 2014 - 30 April 2015*, COM(2015)236, Op. cit. p. 9/10.

⁸⁵ The unpublished Commission Implementing Decision C(2014)8377 of 14 November 2014, mentioned in European Commission (2016), Proposal for a Council Implementing Decision setting out a recommendation for temporary internal border control in exceptional circumstances COM(2016)275; The annual evaluation programme for 2016

performed in the first months of 2015 (see Sub-Section 5.1.1.). A few months later, unprecedented numbers of refugees, fleeing the war situation in the Middle East, crossed the external borders of the Schengen area. The refugee crisis gave rise to a prolonged and intensive evaluation and monitoring of controls following the findings of unannounced on-site visit at the external borders of Greece in November 2015.

3.3. Role of the Commission, the Parliament and national parliaments

3.3.1. Role of the European Commission

The Regulation provides that the Member States and the Commission are jointly responsible for the implementation of the SEM. But the Commission is also entrusted with an overall coordination role in relation to establishing annual and multi-annual evaluation programmes, drafting questionnaires and setting schedules of visits, conducting announced and unannounced visits and drafting, together with the team of experts performing the visit, the evaluation reports and draft recommendations. The Commission also ensures the follow-up and monitoring of the evaluation reports and the Council's recommendations.⁸⁶

The power to adopt recommendations remained with the Council. The Regulation's preamble gives four reasons: 1. To strengthen mutual trust between Member States, 2. To reinforce peer pressure amongst them, e.g. through political discussions at ministerial level, 3. To reflect that the evaluation system fulfils a complementary function in parallel to the normal control procedure, such as the infringement procedure and 4. To take into account "the potential politically-sensitive nature of recommendations, often touching on national executive and enforcement powers".⁸⁷ If the evaluation team during a visit identifies serious deficiencies in the management of external borders, the Commission, on the basis of the SBC, may in addition recommend that the Member State evaluated take certain specific measures with a view to ensuring compliance with the Recommendation adopted under Article 15 of the Regulation.⁸⁸ The proactive evaluation and monitoring mechanism of the Regulation creates the possibility that deficiencies and non-compliance with EU law are detected at an earlier stage and can be remedied at shorter notice than the often very lengthy and adversarial infringement procedures.

In order to allow Member States to be informed at an early stage about the Commission's activities, to influence and potentially block measures considered undesirable, certain activities first have to be discussed in a committee of Member States' representatives that "assists" the Commission. This form of preventive control applies with respect to the drafts of the annual and multi-annual programmes, of the standard questionnaire, and of the draft evaluation reports after a visit to a Member State.⁸⁹ The Member State concerned has opportunity to challenge or explain the findings during the 'drafting meeting'. This report is transferred to other MS for consideration. In addition, the Commission is acting collegially, meaning that, while the Directorate General for Migration and Home Affairs (DG HOME) is in the driving seat, other Commissioners and also the President of the Commission can influence the final result.

was established in European Commission (2015) Commission Implementing Decision of 9.12.2015 establishing the first section of the annual evaluation programme for 2016 in accordance with Article 6 of Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis, C(2015) 8537 final, Brussels, 9.12.2015.

⁸⁶ Article 3 of the SEM.

⁸⁷ Recital 11 of the SEM.

⁸⁸ Article 21 of the SBC.

⁸⁹ Article 5(2), Article 6(9), Article 9(1), Article 14(5) and Article 21 of the SEM.

3.3.2. Role of the European Parliament

According to Article 70 TFEU, the European Parliament and national Parliaments shall be informed of the content and results of the evaluations of the implementation of EU policies in the Area of Freedom, Security and Justice. Accordingly, the Regulation stipulates that most of the key documents produced during the evaluation mechanism be transmitted by the Commission to the Parliament under the confidentiality rules.⁹⁰ This applies to the multi-annual evaluation programme, the annual evaluation programme, the Frontex risk analyses, the evaluation reports on each Member State, the recommendations to Member States, the action plans and their implementation, the annual reports on the evaluations carried out and the review report.⁹¹

The content of Member States' replies to the standard questionnaire is only available to Parliament upon request in "serious matters", on a case-by-case basis. But the Commission has to inform the Parliament of the replies.⁹² If an on-site visit reveals a serious deficiency deemed to constitute a serious threat to public policy or internal security, the Parliament may ask the Commission for more information.⁹³ It is unclear how the Parliament would be aware, unless it first has received the draft report from the Commission, about such serious deficiencies in a Member State.

Most documents transmitted by the Commission under the Regulation are classified as 'EU RESTRICTED'⁹⁴, meaning that disclosure of this information "could be disadvantageous to the interests of the Union or of one or more of the Member States."⁹⁵

According to the SBC, the Commission has to inform the Parliament of notifications by Member States of their plans to temporarily reintroduce controls at their internal Schengen borders, of the actual reintroduction and the Member States' reports on those reintroductions and of the reasons which might trigger the application of Article 21 and Articles 25 to 30 SBC.⁹⁶ If the Member State decides to classify part of the information, this does not preclude the Commission from making the information available to the Parliament. The transmission and handling of information and documents transmitted to the Parliament must comply with the rules concerning the forwarding and handling of classified information between the European Parliament and the Commission.⁹⁷ The same applies to classified SEM documents.

The rules on transmission and handling of classified documents are to be found in the inter-institutional agreement and in the Parliament's rules of procedure on handling of classified information apply.⁹⁸ In practice, very few MEPs actually have access to these documents. While MEPs and Political Group Advisors have access, MEPs' assistants are not able to read the "EU RESTRICTED" documents in the Secret Room of the European Parliament.⁹⁹ MEPs are not allowed to take any notes. In addition, the blanket nature of making whole documents confidential, not only its sensitive parts, discourages MEPs, as it takes time to find the key

⁹⁰ European Parliament and Council (2014), Interinstitutional agreement of 12 March 2014, OJ C 95, Op. cit.

⁹¹ Article 5(1), Article 6(2), Article 7(1), Article 14(5), Article 15(3), Article 16(1) and (6), Article 20 and Article 22 of the SEM.

⁹² Article 9(2) of the SEM

⁹³ Article 16(7) of the SEM.

⁹⁴ Interview with LIBE Secretariat, 03.06.2016.

⁹⁵ Article 2(d) of the European Parliament (2015), *Rules of Procedure of the European Parliament, 8th parliamentary term - September 2015*, ANNEX VII : Confidential and sensitive documents and information.

⁹⁶ Articles 27 to 29 and Article 31 of the SBC.

⁹⁷ Article 27(3) of the SBC.

⁹⁸ Article 17 of the SEM and European Parliament and European Commission (2010), ANNEX II, Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304/47, Brussels, 20.11.2010 and European Parliament (2015), Annex VII of the Parliament's Rules of Procedure.

⁹⁹ Interview with LIBE Secretariat, 03.06.2016.

information.¹⁰⁰ And finally, whereas the final documents are transmitted by General Secretariat of the Commission to the Secret Room of the European Parliament, the drafts are transmitted by DG HOME to the LIBE Secretariat.¹⁰¹ There is anecdotal evidence that MEPs are running between both places in order to get the full overview from draft and final documents.¹⁰²

On the Parliament's website, before February 2016 and the debate on the evaluation of the controls at the external borders of Greece in Strasbourg,¹⁰³ no trace of a motion, a parliamentary question, a written declaration or a debate on the new Schengen evaluation mechanism or on any of the documents transmitted to the Parliament on the basis of the new Regulation could be found.

According to recital 14, during the evaluation and monitoring, special attention should be paid to respect for fundamental rights. According to Article 12 the training of the evaluation team experts should cover respect for fundamental rights. These provisions were inserted under pressure from the Parliament and increased the role of the EU Fundamental Rights Agency (FRA). If the Commission or Member States violated these or other provisions in the Regulation, the Parliament could start an action before the Court of Justice, e.g. for annulment of an implementing act establishing a questionnaire or evaluation report failing to properly address fundamental rights. At the moment, however, FRA experts are invited as observers in on-site evaluation missions related to returns and SIS II, but not on borders issues.¹⁰⁴

Finally, according to recital 20, the Parliament has to be consulted in advance if the Commission is considering submitting a proposal to amend the Regulation. The SBC goes less far, demanding only, in Article 43(5) (former Article 37a), that the Parliament is "immediately and fully informed of any proposal to amend" the Regulation.

3.3.3. Role of national parliaments

Both the TFEU and the Regulation provide for the transmission of information to national parliaments and, hence, give them a potential role. The Commission has to inform the parliaments of the content and results of the evaluations and transmit the annual reports and the Council should transmit its recommendation to the national parliaments.¹⁰⁵ This information should allow those parliaments to supplement the check provided by the European Parliament. Whether national parliaments have indeed received the relevant information could not be established. For example, interviewees in the Permanent Representations could not recall any involvement of the National Parliaments. In addition, in the Dutch and German parliamentary document registers from 2015, there is no trace of these documents. The (unpublished) proposal adopted by the Commission in late 2015 for a Council recommendation on the management of the external border by Sweden, apparently, was transmitted to the German Bundestag in January 2016.¹⁰⁶

¹⁰⁰ Interview with MEP, 01.06.2016.

¹⁰¹ Interview with LIBE Secretariat, 03.06.2016.

¹⁰² Interview with MEP, 01.06.2016.

¹⁰³ European Parliament Newsletter on "1-4 February 2016 - Strasbourg plenary session", <http://www.europarl.europa.eu/news/en/news-room/plenary/2016-02-01/1>.

¹⁰⁴ Interview with FRA, 04.05.2016.

¹⁰⁵ Articles 15(3), 19 and 20 of the SEM.

¹⁰⁶ See *Bundestag Dru cksache* 18/7612, listing under point A.5: European Commission (2015), Proposal for a Council Recommendation in accordance with Article 15(2) of Regulation (EU) No 1053/2013 of 7 October 2013, COM(2015)672, Brussels, 11.12.2015; Council (2016), Proposal for a Council recommendation addressing the deficiencies identified in the 2015 evaluation of Sweden's application of the Schengen acquis in the field of management of the external border (Arlanda Airport), Council document 5240/16, Brussels, 02.02.2016.

In discussions with officials of both Chambers of the Dutch Parliament for the purposes of the study, it emerged that they did spot unpublished Commission action plans and proposals for recommendations and action plans on the basis of Article 15 in 'Extranet', a database from the Council including classified or other non-published EU documents accessible to Member States' governments. They were not, however, aware that the Commission had transmitted the non-public documents to the Dutch Parliament. The latter was not notified that Commission had produced new documents under the Regulation and that those documents, which the Commission is obliged to transmit to the national parliaments, are available via Extranet.

This appears to be a rather minimalistic interpretation of the Commission's obligation to transmit these documents to the national parliaments. According to these officials, only publicly available Commission documents are sent directly to national parliaments. Most Schengen evaluation documents on the basis of the Regulation are confidential and not available to the public. This may explain why these documents are not mentioned in national parliamentary documents and why there has been no recorded parliamentary discussion on such documents in these two Member States. The confidential nature of the documents severely restricts the possibilities for MPs to consult experts other than government officials on the meaning of these documents or to have a public discussion on these documents.¹⁰⁷

¹⁰⁷ For example, Maurer A. (2015), *Comparative study on access to documents (and confidentiality rules) in the international trade negotiations*, European Parliament Policy Department, Directorate General for External Policies, Brussels, April, 2015.

4. STATE OF PLAY: WHAT DOES THE SCHENGEN BORDERS CODE MEAN IN PRACTICE?

KEY FINDINGS

- The Member States' justifications for the reintroduction of intra-Schengen state borders controls under Articles 25 – 26 SBC, in particular on and after 13 September 2015 are inadequate.
- The proportionality assessment for the reintroduction of intra-Schengen border controls needs to be thorough and complete given the fundamental nature of the right to intra-Schengen free movement of persons.
- Member States should provide serious and compelling reasons, with supporting documentation regarding the genuine existence of a threat, if seeking to curtail the free movement of persons across the area since the border-control-free free movement of persons is one of the main objectives of the internal market and a core benefit of it.
- Where Member States invoke the threat of terrorism as a reason for the reintroduction of intra-Schengen border controls, sufficient detail as to the nature of the threat must be provided to the EU institutions so that they can ensure that the proportionality assessment is correctly carried out.
- The EU institutions and the Member States must respect their duty under the Refugee Convention (Article 31) and so may not initiate criminal prosecutions or apply any other penalties to refugees for their irregular entry onto their territory (including that which results from intra-Schengen movement).
- Whereas Article 23(a) of the SBC stipulates that the exercise of police powers on internal borders may not have the objective of border controls and must be based on general police information and experience 'regarding possible threats to public security and aim, in particular, to combat cross-border crime', several Member States use police checks in border areas for immigration control purposes, making a direct connection between irregular immigration and possible threats to public security. This practice is contrary to the purpose of Article 23(a) and recital 26 of the SBC.
- National practices of mobile police checks at the internal borders illustrate that the line between border controls and border checks, prohibited in Article 22 of the SBC on the one hand, and police checks allowed in Article 23 SBC, on the other, is unclear.
- The classification of 'asylum seekers' as 'illegal immigrants' to justify border controls or police checks in border areas runs counter to the SBC and CEAS. It allows the extended use of internal border checks, contrary to the purposes of the SBC and means that asylum seekers crossing internal borders can be detained on the basis of regular migration rules, disregarding applicable EU laws on the reception of asylum seekers.

This section identifies challenges in relation to the rule of law standards in the 2013 Schengen governance reform package as mapped out in Section 3. The question that arises in light of the refugee and security crises of 2015-2016 is whether the new framework is sufficiently robust for the successful operation of the Schengen border-control-free area.

As mentioned in the Introduction, a majority of people arriving in the EU in 2015/16 seeking asylum were from countries torn apart by recent or ongoing conflicts and wars, such as Syria, Afghanistan, and Iraq – countries with high refugee recognition rates. Thus, the intersection

of the arrival of refugees in larger numbers than anticipated and the perception of unreasonable pressure on the intra-Schengen borders is evident. Some of the Member States claimed they asked the Commission how to properly apply the CEAS and SBC in this case, and subsequently, where to register people coming – in EURODAC or SIS II.

The most substantial issue that concentrated the minds of officials in Ministries of Interior (MoI) over this period was finding reception facilities for the arrivals.¹⁰⁸ Member States tended not to keep significant reception facilities available for asylum seekers, but rather to try to expand and contract these facilities depending on the ebbs and flows of arrivals. This has many unfortunate consequences, not least endless investment in recruitment and training. Well-trained and experienced officers are let go because of a drop in numbers one year, only to be replaced a year or two later with new inexperienced officers when the numbers go up again.

Similarly, Member States do not keep substantial housing stock available in case of an increase in asylum arrivals. But when people do arrive, they need to find housing rapidly. The impact of successful efforts to maximise flexibility in asylum reception systems was revealed when the numbers of people using the system increased substantially and Member States were left scrambling to catch up with reception needs. The temptation to make this reception need a problem for the neighbouring Member States must have been substantial. In addition, some MS on the 'Balkan route' have requested and received emergency funding to deal with the issues. However, there were also expectations among Member States affected that the EU agencies and/or other MS would extend their hand to provide substantial help in terms of human resources for border guards or police functions, though not that much in terms of asylum support services and caseworkers. This led to creative solutions; the Slovenian authorities, for example, established common police patrols under the Prüm decision.¹⁰⁹

The actual responses to the refugee and security crises varied from reintroducing intra-Schengen border controls under the SBC to informal responses such as using police checks at internal borders and even setting up fences. This placed renewed strain on the new governance system put in place in the aftermath of the Franco-Italian affair (See Section 2). This section further sets out the legal and practical issues, which arose when implementing the Schengen Borders Code in the light of the refugee crisis.

4.1. A legal assessment of the justifications provided by Member States on the reintroduction of intra Schengen border controls 2015-16

The criteria against which any justification by a Schengen state to reintroduce border controls with another Schengen state must be assessed are now set out in Regulation 2016/399. The Regulation, in Articles 21 and 25–30, sets out the conditions under which the reintroduction of intra-Schengen state border controls can (lawfully) be applied.

The first requirement of Article 25, setting the general framework, is that there must be a "serious threat to public policy or internal security" in a Member State. There is no definition of 'public policy' in the Regulation. There may be a presumption that the meaning is consistent with the use of the same words in other EU instruments (including the Treaties, which use the same words).

In 2011 the European Parliament published a detailed study on the meaning of public policy

¹⁰⁸ Interview with German Permanent Representation, 27.05.2016; Slovenian Permanent Representation, 30.05.2016.

¹⁰⁹ Interview with Slovenian Permanent Representation, 30.05.2016.

in the context of EU instruments of private international and procedural law.¹¹⁰ The public policy exception is consistently narrowly interpreted by the CJEU as a restriction on a right. This is likely to be the case here as well, as the subject matter is a core principle of the internal market, i.e. the free movement of persons.¹¹¹ This principle is set out in recital 27 of the SBC (emphasis added):

“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.”

As the legal base of the SBC is Article 77(2)(b) of the TFEU, which sets out the procedure to ensure the absence of controls on persons, whatever their nationality, when crossing internal borders, a narrow meaning of the exception on the grounds of public policy consistent with the meaning of the term as used elsewhere in the free movement of persons context is justified. The CJEU considered the compatibility of public policy with police checks inside the border in its *Adil* ruling¹¹². The court found that police controls inside the border area which are selective and do not resemble border controls but are police measures aimed at combating illegal residence, whether they fall under the concept of public order or public security, are compatible with the Regulation. But it did not clarify the scope of the test of the use on the grounds of public policy (see the Case Summary in Annex 1).

Internal security is similarly not defined in the Regulation. The term is less frequently used in EU law, though it exists in the TFEU, notably in Article 72.¹¹³ The EU has an internal security strategy that includes tackling serious and organised crime, terrorism and radicalisation, cybercrime, threats from new technologies, new and emerging threats and crises, natural and man-made disasters.¹¹⁴ A link could be inferred regarding the meaning of internal security from the choice of subjects included in the strategy of that name. In any event, when a Schengen state seeks to use the internal security ground for the reintroduction of intra-Schengen border controls, reasons and justifications must be provided and explained. Whether the threat is one of organised crime or radicalisation, definitions, the nature and extent of the threat, the weight of the evidence of the threat and any relevant statistics would need to be provided.

The reintroduction of intra-Schengen border controls must be exceptional and introduced as a last resort (Article 25(1) and (2)). Recital 23 of the SBC Preamble provides more clarity, stating (emphasis added):

“As **free movement of persons** is affected by the temporary reintroduction of internal border control, any decision to reintroduce such control should be taken in accordance with **commonly agreed criteria** and should be **duly notified** to the

¹¹⁰ Hess, B., and Pfeiffer, T. (2011), *Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law*, European Parliament, Brussels.

¹¹¹ For instance: Article 27 of European Community (2004), *Directive 2004/38 on the right to move and reside of citizens of the Union* states that “Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures” and that “the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.”

¹¹² CJEU (2012), *Atiqullah Adil v Minister voor Immigratie, Integratie en Asiel, C-278/12 PPU (Adil case)*, Judgment of the Court (Second Chamber) of 19 July 2012.

¹¹³ Peers, S., (2013) “The extent of national competence as regards internal security,” *Submission to the EP inquiry into mass surveillance*, Brussels, 18.11.2013; Peers, S. (2011), *EU Justice and Home Affairs Law*, 3rd edition, Oxford EU Law Library, Oxford.

¹¹⁴ Council (2014) *Council Conclusions of 4.12.2014 on the development of a renewed EU Internal Security Strategy*, Brussels, 4 December 2014.

Commission or be recommended by a Union institution. In any case, the reintroduction of internal border control should remain **an exception** and should only be effected as a **measure of last resort**, for a **strictly limited scope** and period of **time**, based on **specific objective criteria** and on an **assessment of its necessity** which should be **monitored** at Union level.”

This confirms the status of intra-Schengen border controls as an exception to a fundamental right – the free movement of persons. It further indicates that the interpretation of any exception should be narrow and that the monitoring of the use of the exception must not rest with the Member State that is applying it, but with the Union.

It is worth noting that, according to recital 26 of the SBC (emphasis added):

“**Migration** and the crossing of external borders by a large number of third-country nationals **should not, per se**, be considered to be a **threat** to **public policy or internal security**.”

Thus, where a Schengen state seeks to rely on the movement of persons across a Schengen border as a ground for reintroduction of controls, a justification well beyond the mere movement of persons must be involved. As Frontex reports in its 2016 Risk Analysis, at least 222,931,394 people entered the EU in 2015.¹¹⁵ These almost 223 million persons will have the possibility of crossing Schengen internal borders once inside the EU. Thus the movement of persons as a ground for the reintroduction of intra-Schengen border controls clearly must have a much more substantial content than numbers. Numbers over time and the purpose for which people come to the EU can have a differential impact on some Member States, in comparison with others, of course. People in need of international protection may need more assistance at the beginning of their stay if they have not been able to arrive with their goods and belongings like tourists. Yet, the scale of the numbers of persons in need of protection is dwarfed by those of travellers in general. There is a difference between the justifications offered by Sweden, which hosts quite a lot of beneficiaries of international protection, and Denmark and Norway, who host far fewer. But the argument that border controls are an appropriate way to engage with the different destinations of refugees is suspect. On the contrary, some of the proponents arguing for maintaining open borders are doing it not out of solidarity, but in the hope that they are just transit countries for asylum seekers (See Sub-section 4.5 on Visegrad states). This reveals the tensions between the fairly well-functioning SBC and Dublin III, which has never functioned properly.

The criteria for the temporary reintroduction of border controls (and their prolongation) are set out in Article 26. The main question that the Member State must assess is the extent to which the measure is likely to adequately remedy the threat to public policy or internal security and the proportionality of the measure in relation to the threat. Criteria that must be taken into account are:

- (a) The **likely impact** of any **threats** to public policy or internal security including following terrorist incidents or threats and including those posed by organised crime;
- (b) The **likely impact** of such a **measure on the free movement of persons** within the area without internal border controls.

This means that Schengen states must provide exact details of the nature of the threat and its impact, which must be so substantial and immediate that it justifies the use of exceptional border control measures. Furthermore, the consequences of blocking EU citizens and their

¹¹⁵ Frontex (2016), Risk analysis for 2016. URL: http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf

right to free movement must be taken into account in order to assess the proportionality of the measure, as against the primary right of EU citizens to move freely within the area.

The procedure is set out in Article 27, which requires the Member State to notify the other Member States and the Commission, within the time limit, supplying the following information:

- (a) The reason for the proposed introduction including all relevant data detailing the events that constitute a serious threat to public policy or internal security;
- (b) The scope of the proposed reintroduction specifying for which parts of the internal borders controls will be introduced;
- (c) The names of the affected crossing points;
- (d) The date and duration of the planned reintroduction.

The information must be provided to Member States, first and foremost, as they are the most immediately affected by any reintroduction of controls. The Commission is charged with ensuring that the justifications pass the proportionality test and fulfil the heavy evidential requirements of the Regulation and that Member States do not take these measures, which are profoundly negative in respect of the fundamental rights of the Treaties, lightly or on the basis of inadequate information.

The procedural requirements also include substantive elements that must be satisfied by any Member State seeking to reintroduce such border controls. The Regulation requires evidence of the threat, including data, to be submitted to the Member States and the Commission. The Member States are obliged to provide very specific data as to the time and place so that the other Member States and the Commission can fully assess the proportionality of the measure against the threat that the Member State has specified and justified under Article 26.

4.2. Third country national movements or refugee movements?

On an examination of the notifications made by the Member States which have reintroduced intra-Schengen border controls on the basis of the movement of third country nationals since 13 September 2015, there seems to be a noticeable shortage of detail on the reasons for the reintroduction of border controls.

The **German** notifications¹¹⁶ seem to be motivated by exasperation with the Italian and Greek authorities' management of their external borders. The references, necessary according to the Regulation, to public order and internal security are without any specific detail.

The same is true for the **Austrian** notifications¹¹⁷, which seem to have been based on the German ones. The Austrian authorities sought to bolster their public security argument in their 18 November 2015 notification¹¹⁸ by mentioning security deficits, but again there is no detail. However, the burden on the police is put forward as a reason in the 15 October notification.¹¹⁹ This is an interesting ground as it suggests that the public security threat is due to the shortage of Austrian law and order personnel available for deployment. In the notification of 14 March 2016¹²⁰ the Austrian authorities continued their attack on Greek border controls: "Austria, due to ascertained and still prevailing serious flaws in external border controls in Greece, will continue to conduct internal border controls for a further two months [...] This is the only way within the scope of legal and actual opportunities to avoid

¹¹⁶ German delegation (2015), Council Document, 11986/15.

¹¹⁷ Austrian delegation (2015), Council Document 12110/15.

¹¹⁸ Austrian delegation (2015), Council Document 14211/15.

¹¹⁹ Austrian delegation (2015), Council Document 13127/15.

¹²⁰ Austrian delegation (2016), Council Document 7136/16.

security deficits in the future for the benefit of all citizens within the Schengen area" (see Annex 3 for more analysis).

The claim that border controls within the Schengen area are of benefit for EU citizens is a rather hollow inversion of the obligation in Article 26 SBC to assess the impact of the controls on the free movement of persons. Instead of providing details of the obstacles that the border controls may constitute for EU citizens, the Austrian authorities seek to justify the controls (without any further data or arguments) on the basis of securing those citizens (see Annex 3 for more analysis).

Slovenia was in and out very quickly, though it is clear that their authorities did not examine too carefully the requirements as regards the grounds for a reintroduction of border controls¹²¹ (see Annex 3 for more analysis).

Hungary allegedly took some internal border measures from 17 to 26 October 2015, though no notifications are available in the Council Registry. The Hungarian authorities started building a fence along the internal border with Slovenia, though the measures were abandoned and it was then claimed that roadworks had been going on.¹²²

The Nordic Union countries appear to have their own specificities regarding the public security threat. The **Swedish** notifications provide a very interesting argument regarding the 'functioning of Swedish society' as one of three goals of Swedish security.¹²³ This probably makes sense in a Swedish context but it is difficult to unpick from a distance. Norway is concerned about the unpredictability of arrivals as a security threat. In its notification of 14 April 2016,¹²⁴ the **Norwegian** authorities stated that "the number of asylum seekers arriving in Norway continues to be low. However, we still fear that this might change if the controls are lifted as the migratory pressure at the external border continues to be significant." On this basis there will never be a time when the controls should be lifted as their presence is based on nebulous fears. **Denmark's** public security threat appears to be that people might not move on as quickly as the Danish authorities would like because its neighbours have imposed carrier sanctions requiring travel companies to check ID documents (for more analysis, see Annex 3).

None of these notifications fulfils the simple criterion in Article 26, i.e. the requirement to make a reasonable claim regarding the likely impacts of any threats to public policy or internal security, including following terrorist incidents or threats and including those posed by organised crime. The justifications amount to no more than bare assertions without any evidence, explanation or other material that might substantiate the claim.

The objective of Article 26 is to require Schengen states to provide real information and credible claims on threats to public policy or internal security. Not one of the states has done this in any credible manner. The mere repetition of the words "public policy" and "internal security" is not the equivalent of real grounds for the reintroduction of border controls as required by Article 26. Vague references to worries about over-burdened police, with no indication as to why the authorities are unable to transfer police from other regions to assist or to engage temporary officers to fill the gaps, are inadequate. Claims that other Member States (Greece and Italy) are not doing their job on border controls will be addressed further below in the context of the right to seek asylum under the Charter of Fundamental Rights

¹²¹ Slovenian delegation (2015), Council Document 12111/15.

¹²² Interview with Slovenian Permanent Representation, 30.05.2016.

¹²³ Swedish delegation (2015), Council Document 14047/15.

¹²⁴ Norwegian delegation (2016), Council Document 7948/16.

(EUCFR). The threat to the functioning of Swedish society caused by the arrival of refugees would need much more explanation and development to satisfy the requirements of Article 26. The claim that the functioning of Swedish society is under stress is not substantiated by any statistics or data on the actual situation on the ground.

The **Belgian** authorities reintroduced border controls with France on 24 February 2016 in the Province of West-Flanders. According to the notification¹²⁵, the reason was the serious impact on public policy and internal security because of the situation in the North of France and the fact that the Port of Zeebrugge “creates a major pull effect to migrants trying to reach the UK”.

According to the notification, the Belgian police are faced with criminal organisations involved in the trafficking and smuggling of human beings, the visual presence of significantly increased numbers of irregular and homeless migrants has a negative effect on public security, and illegal intrusions into the port of Zeebrugge create unacceptable safety and security risks. Finally, the notification states that “the expected and announced closures of illegal settlements of migrants around the main port areas of Calais and Dunkirk...will most likely generate a further significant growth of the number of irregular migrants towards West-Flanders.” In the second notification, the Belgian authorities¹²⁶ accepted that “transmigrant” numbers had dropped significantly but claimed that the security impact remained high. In particular the Belgian authorities sought to prevent the emergence of tent camps and noted the material damage, which “has an impact on the general feeling of insecurity of the inhabitants of the region.” The authorities stress the success of the measure to achieve a better level of security. In the next notification of 29 March¹²⁷, 2016 the Belgian authorities noted that “with improved weather conditions ahead, the chances are that more people will want to attempt to cross over to the UK” as a reason for the continuation of the border control with France. This weather argument was repeated in the notification of 13 April¹²⁸ 2016 “the risk is real that this rise [in numbers of migrants] will continue because of the start of the summer season and the better weather conditions.” (See Annex 3 for more analysis).

Noticeable in this Belgian series of notifications is the argument that border controls with France are necessary to prevent migrants from getting to the UK. The centrality of weather conditions is also interesting.

In any event, nowhere are the requirements of Article 26 met. The likely impacts are not supported by any data other than the numbers of people seeking asylum in West Flanders, which rose from 133 in January 2015 to 783 in December 2015 but with no indication of where they came from. The assumption that these are arrivals from France is nowhere even mentioned in the notification. How border controls impact on port safety is a matter of some debate and the argument that the local inhabitants do not like to see homeless people on the streets should galvanise the authorities to provide shelter, as they are required to under the European Social Charter.¹²⁹ The suggestion that predictions about the weather determine the movement of people is particularly surprising. While it is certainly the case that those best

¹²⁵ Belgian delegation (2016), Council Document 6490/1/16.

¹²⁶ Belgian delegation (2016), Council Document 7351/16.

¹²⁷ Belgian delegation (2016), Council Document 7351/1/16.

¹²⁸ Belgian delegation (2016), Council Document 7873/16.

¹²⁹ European Committee of Social Rights (2009), *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, Council of Europe: European Committee of Social Rights, 20 October 2009. URL: <http://www.refworld.org/docid/4b9e37ea2.html> [accessed 4 May 2016]; European Committee of Social Rights (2013), *Conference of European Churches (CEC) v. The Netherlands (complaint)*, Complaint No 90/2013, Council of Europe: European Committee of Social Rights, 21 January 2013. URL: <http://www.refworld.org/docid/513d96582.html> [accessed 4 May 2016].

placed to make reasonable predictions are the weather authorities, the association of their predictions with movements of people in need of international protection is not substantiated.

4.3. How well do borders work as a response to terrorism?

Two Member States reintroduced border controls on the basis of a terrorism threat – namely Malta and France. **Malta** suggested that the global terrorist threat was sufficient, which if accepted would mean that Malta might never lift intra-Schengen border controls again as the global terrorist threat is something so nebulous that it is unquantifiable.¹³⁰ In the event, Malta lifted its border controls on 31 December 2015 (according to the European Commission) just in time for the New Year (see Annex 3).

France justified its reintroduction of border controls on the basis of a national state of emergency. As the object of all three substantial terrorist attacks in the EU in 2015 (January, July and November) one can understand the view of the French authorities that they have a problem. Whether border controls are the solution is another question. However, for the moment, the Commission does not appear likely to challenge the French choice of border controls as a counter-terrorism measure. In the prolongation notification of 29 March,¹³¹ the French authorities noted that the three-month state of emergency in France from 13 November 2015 until 13 February had been renewed for a further three months and so the French authorities were extending their reintroduction of border controls for a similar period. A further notification on 25 April¹³² stated that, "in light of the major ongoing terrorist threat, illustrated by the attack on Brussels on 22 March 2016, the French Government has decided to extend these border controls until 26 May 2016 inclusive" (see Annex 3).

It may well be that there is evidence of a terrorist threat on the border between Belgium and France but the question which must be answered with details and specific material according to Article 26 is how the reintroduction of border controls between them (and France has purported to introduce border controls with all neighbouring Member States) contributes to the task of dismantling terrorist network(s). All passengers who take the Thalys train from Paris to Brussels are acutely aware of the negative impact on travel these controls have for people seeking to leave France. But what is unclear is the positive impact there may be in counter-terrorism terms. The proportionality of the border control response to the terrorist threat needs a more thorough justification.

4.4. The scope of the controls

There are three types of controls that may be invoked. The first are exceptional controls where an unforeseen event (or series of events) justifies the immediate reintroduction of border controls as there is not time to inform the other Member States and institutions. This type of border control can be extended for ten-day periods for up to two months. As soon as the threat is foreseeable, the second type of control must be used where advanced notice to the other Member States and institutions is required before the introduction of the controls. This form of control can be used for up to six months with regular updates regarding the continuing existence of the threat. The third type of control is one that must be based on exceptional circumstances where the overall functioning of the Schengen area is put at risk. This requires a decision of the Council on the basis of a proposal by the Commission specifying the nature of the risk and why it constitutes a threat to the overall functioning of the system. What happened in the period from 13 September 2015, when the first reintroduction of controls was announced by Germany on the first exception basis, is that all the Member

¹³⁰ Maltese delegation (2015), Council Document 14731/15.

¹³¹ French delegation (2016), Council Document 7360/1/16.

¹³² French delegation (2016), Council Document 8217/16.

States that reintroduced controls used the maximum period of two months on the exceptional un-notified basis, then the full period of the notified reintroduction of controls – a further six months. This seems rather calculated in order to maximise the available period for controls before a decision on exceptional circumstances putting at risk the overall functioning of the system would need to be taken.

Turning to the scope of the border controls, here the notifications are more precise. All Member States (except Malta) provide some details of where they plan to carry out the border controls, as required by Article 27 of the SBC (former Article 24). In some cases the details about the exact border crossing points at which these will be conducted are fairly complete (for instance, as regards Austria) but in other cases are very imprecise, such as in the cases of Denmark and Norway. These include, for the most part, the names of the affected crossing points. There are fewer specifics on the date and duration of the reintroduction of border controls. The need to re-notify the institutions every 10/20/30 days or for the foreseeable duration means that there are quite a lot of notifications in the Council Registry, though it would seem that some are missing.

An assessment of the impact of the border controls on public policy is generally missing. While there are standard statements in the notifications of the importance of public security, there are no specifics on why there is a threat that reaches the threshold of public security. Furthermore, there is little clarification on why border controls are a solution to any threat at all. No state seems willing to indicate how border controls at a small number of border crossing points with a few neighbours is going to solve security deficits. It is also worth remembering that these controls only apply to those border crossing points that Member States themselves have notified to the Commission under the SBC as places where the Code applies. So they do not automatically apply to green field border crossings (a matter of national law). As regards the grounds of internal security, here too there is a lack of precision. The need to make a proportionality assessment of the need for intra-Schengen border controls in light of the threat to internal security is entirely missing.

None of the notifications address the impact on the free movement of persons within the Schengen area, though this is something that the Commission addresses in its assessment of the Austrian/German reintroduction of border controls (it notes that no EU citizens have complained to them, so apparently the controls are not annoying EU citizens).¹³³ The 14 March 2016 Austrian notification suggests that its reintroduction of border controls is, in fact, for the benefit of all citizens of the Union though there is no justification given for this statement.¹³⁴

4.5. The Visegrad States

The Visegrad states' position looks like something of a puzzle. In the statement of December 2015, they urged common, resolute and united action by Member States to preserve freedom of movement within Schengen, but, on the other hand, the same countries opposed a plan for the relocation of asylum seekers in order to address the arrival of high numbers of migrants at the external borders of the EU and they even started to build fences.

¹³³ European Commission (2015), Commission Opinion of 23.10.2015 on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria pursuant to Article 24(4) of Regulation No 562/2006 (Schengen Borders Code), C(2015) 7100 final, Brussels, 23.10.2015.

¹³⁴ Austrian delegation (2016), Council document 7136/16.

The only 2004-accession Member State to introduce border controls under Article 28 SBC was Slovenia¹³⁵, and it dropped the controls quickly. In reaction to the Proposal for Council Implementing Decision, Slovenia questioned the proportionality of the measures maintained by Germany, Austria and the Nordic countries. Nevertheless, Slovenia was also among the countries that responded by building a fence on the border with Croatia, which is a Schengen candidate country.¹³⁶

On 17 December, in the margins of the European Council meeting, the Visegrad states (the Czech Republic, Hungary, Poland and the Slovak Republic) issued a statement regarding the emergency introduction of intra-Schengen border controls.

The statement is something of a warning to those states that have reintroduced border controls: "A common resolute and united action is needed to improve, support and preserve Schengen as one of the cornerstones of the European integration project. We call on all true friends of Schengen to join this effort towards a conclusive debate on the key proposals tabled by the European Commission in this respect."¹³⁷ Clearly, among the strongest supporters of a border-control-free Europe are those who arrived last at the table.

For these states there has been a very sharp distinction drawn between the operation of the Schengen area and the arrival of refugees in unexpected numbers in the EU. While the Visegrad states were very solicitous of the correct application of the Schengen border control free system, they were highly resistant to the asylum re-location plan to distribute responsibility for the reception of asylum seekers, and the sorting of their claims, more evenly across the Member States. Because the relocation proposals shifted asylum seekers towards Visegrad states, they insisted that the relocation system had to be 'voluntary' for states, the very aspect which has hampered the implementation of the relocation system. The Czech Republic, Hungary, Romania and Slovakia voted against the relocation scheme, adopted by the Council in September 2015, for the relocation of asylum seekers from Italy and Greece (and initially Hungary) to other Member States.¹³⁸ Hungary has brought an action before the CJEU seeking annulment of the Council Decision, essentially arguing that this decision lacks a legal basis in EU law.¹³⁹

¹³⁵ The situation of Hungary is not available in the Council Registry, though the Commission states that it re-introduced intra-Schengen controls for a short period before lifting them. See European Commission (2016), Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016) 85 final, Brussels, 10.2.2016.

¹³⁶ See: Barbara Surknov, "Slovenia Builds Border Fence to Stem Flow of Migrants," November 11, 2015 in *New York Times*. URL: http://www.nytimes.com/2015/11/12/world/europe/slovenia-border-fence-migrants-refugees.html?_r=0.

¹³⁷ Visegrad Group (2015), Joint Statement of the Visegrád Group countries, Brussels, 17.12.2015. URL: <http://www.visegradgroup.eu/calendar/2015/joint-statement-of-the-151221-1>.

¹³⁸ Council (2015), *Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*, OJ L 239, 15.9.2015, p. 146–156, providing for the relocation of 40,000 persons and Council (2015), *Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, OJ L 248, 24.9.2015, p. 80–94 on the relocation of a further 120,000 asylum seekers. Based on the European Commission (2015) *Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary*, COM(2015) 451 final, Brussels, 9.9.2015.

¹³⁹ CJEU (2015) Case C-647/15, *Hungary v Council of the European Union*, submitted 3 December 2015.

4.6. The right to asylum, in light of the reintroduction of intra-Schengen border controls

As noted above, the Schengen crisis is inherently linked to the arrival of unexpectedly substantial numbers of asylum seekers in the EU. Also, as pointed out above, among the main nationalities of origin, these asylum seekers have been recognised as refugees or have received subsidiary protection in very large percentages. So the crisis could well be framed as not so much one of border controls but rather of reception facilities and the duties of Member States. Border controls became a surrogate for the proper reception of asylum seekers and the correct operation of the CEAS. Instead, the language of 'crisis' transformed the appellation of people from "refugees" (which would soon be recognised) into "illegal immigrants" who were committing criminal acts by travelling through the Schengen border-control-free area. The first consequence was to avoid responsibilities for reception and determination of refugee status under the CEAS. The second consequence has been to place refugees and people who should be receiving international protection and reception while their claims are being considered in danger of being criminalised for unauthorised border crossing, even though the borders are intra-Schengen ones where there should be no controls applied.

Several Member States, in particular in their first notifications, refer exclusively to migrant flows and thus pre-suppose the entry of 'illegal' migrants and not refugees, which is striking. For example, Belgium mentioned "very large numbers of illegal immigrants."¹⁴⁰ Slovenia referred firstly to "uncontrollable migration flows" and then to "illegal migration".¹⁴¹ Austrian authorities, in their first notification, refer to "the huge migration flows" and, in their subsequent notification, to "enormous migration flows".¹⁴² German authorities claim to face an "uncontrolled and unmanageable influx of third-country nationals into German territory" and, in their subsequent notification, report an ongoing "massive influx of third country nationals".¹⁴³ Danish authorities refer to mixed migration: "migrants and refugees".¹⁴⁴ Similarly, Norwegian authorities referred to "an unpredictable migratory flow, containing a mix of asylum seekers, economic migrants, potential criminals [...], victims of crime."¹⁴⁵ Finally, Swedish authorities, like their Norwegian and Danish counterparts,, referred to mixed migration and an "unprecedented migratory flow", which "may include i.a. asylum seekers, economic migrants, potential criminals such as smugglers or traffickers of human beings, but also potential victims of crime".¹⁴⁶

The fact is, however, that the majority of third country nationals who have entered the EU irregularly since the summer of 2015 are in search of international protection.¹⁴⁷ Of them, the majority are Syrian, Iraqi and Afghan, all nationalities with very high recognition rates as persons in need of international protection. As persons seeking international protection, they are entitled to the full application of the 1951 Refugee Convention and its 1967 Protocol, the EUCFR and the CEAS. Only if third-country nationals arrive irregularly and do not seek international protection can they be treated as irregularly present and subject to sanctions. This is the consequence of Article 31 of the Refugee Convention, which states:

¹⁴⁰ Belgian delegation (2016), Council document 6490/16.

¹⁴¹ Slovenian delegation (2015), Council documents 12111/15 and 12418/15.

¹⁴² Austrian delegation (2015), Council documents 12110/15 and 12435/15.

¹⁴³ German delegation (2015), Council documents 11986/15 and 12984/15.

¹⁴⁴ Danish delegation (2016), Council document 5021/16.

¹⁴⁵ Norwegian delegation (2015), Council document 14633/15.

¹⁴⁶ Swedish delegation (2015), Council document 14047/15.

¹⁴⁷ EUROSTAT (2016), Asylum Statistics, at http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics..

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

There is a very lively debate in the international community about the meaning of "coming directly" from a country of persecution. Courts in different EU states have interpreted the provision according to national law. For instance, in the UK, the term cannot be interpreted restrictively. In other words, a stop-off along the way should not exclude the refugee from protection. UK legislation states that the main considerations are the length of stay in the intermediate country, the reasons for the delay there, and whether or not the person sought protection there.¹⁴⁸ The operation of the Dublin III Regulation, which sets out the responsibility of Member States for determining asylum applications made in the EU, is only one of the mechanisms at work.¹⁴⁹

Article 3 SBC states:

"This Regulation shall apply to any person crossing the internal or external borders of Member States, without prejudice to:

- (a) the rights of persons enjoying the right to free movement under Union law;
- (b) the rights of refugees and persons requesting international protection, in particular as regards non-refoulement."

This means that the rules of the SBC do not apply to those seeking international protection, as the Refugee Convention and the CEAS already apply to them and their arrival in and movement around the EU. Yet, the argument of the Member States is that asylum seekers should remain in the first Member State through which they enter the EU and seek asylum there (unless very specific special circumstances apply).¹⁵⁰ In theory, if an asylum seeker continues his/her journey onwards to a more hospitable Member State to make the asylum application, he/she should be sent back to the first one. The Dublin III rule is ostensibly applicable irrespective of the failure of Member States to provide reception conditions as required under the CEAS, though both the CJEU and the ECtHR have effectively modified the rules in their judgments concerning Greece and Italy that vulnerable asylum applicants (and all asylum seekers for Greece) should not be returned to Greece and Italy (where they are families with children) because of the inadequacy of reception conditions there.¹⁵¹

¹⁴⁸ UK Magistrate (1999) INLR 490 at 497A-C, case of *Adimi*.

¹⁴⁹ Moreno-Lax, V.(2012), "Dismantling the Dublin system: MSS v. Belgium and Greece." *European Journal of Migration and Law* 14.1: 1-31.

¹⁵⁰ Hailbronner, K., and Thierry C. (1997), "Schengen II and Dublin: Responsibility for asylum applications in Europe." *Common Market Law Review* 34.4: 957-989.

¹⁵¹ ECtHR (2011), *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: <http://www.refworld.org/docid/4d39bc7f2.html> [accessed 3 May 2016]; CJEU (2011), *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011, available at: <http://www.refworld.org/docid/4ef1ed702.html> [accessed 3 May 2016]; ECtHR(2014) *Tarakhel v. Switzerland*, Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014, available at: <http://www.refworld.org/docid/5458abfd4.html> [accessed 3 May 2016]

It is because of this Dublin III effect that Member States and EU institutions claim they are justified in continuing to refer to asylum seekers moving across the EU as 'migrants', not 'refugees'. Instead, and in spite of Article 31 of the Refugee Convention, Member States insist that these people are irregularly present and have crossed the Schengen borders illegally (and therefore should be punished). The language of penalties is constantly present and the practice of criminalising asylum seekers is growing. According to the FRA, almost a third of people arriving irregularly in Hungary are prosecuted for the offence of unauthorised border-fence crossing.¹⁵² It would seem evident that Article 31 of the Refugee Convention ought to protect these asylum seekers from this kind of prosecution and yet there is a problem. The CJEU in a decision of 17 July 2014 held that it did not have jurisdiction to interpret Article 31.¹⁵³ This was a somewhat surprising decision, not least in light of the pressing need for a consistent EU-wide interpretation of the application of penalties to those seeking asylum who have irregularly crossed EU internal frontiers. The facts of the case resemble those for so many of people moving across the continent in 2015-16. Mr Qurbani was an Afghan national who, having used the services of a people smuggler, entered Greece after passing through Iran and Turkey. He left Greece to travel, by plane, to Munich (Germany), with a forged Pakistani passport obtained from another people smuggler. He was arrested at Munich airport, after the authorities responsible for carrying out checks recognised that his passport was forged and he immediately applied for asylum. He was charged and convicted of unauthorised entry, unauthorised stay and forgery of documents, notwithstanding Article 31. He appealed and eventually the matter was referred to the CJEU. Regardless of the fact that the TFEU requires the CEAS to be in conformity with the Refugee Convention and regardless of the fact that the CJEU had on other occasions interpreted the Refugee Convention in the context of the CEAS, in this case it found it had no jurisdiction to decide on the case. This refusal to deal with an important issue of EU law was exacerbated by the fact that the Qualification Directive¹⁵⁴ specifically refers to Article 31 of the Refugee Convention (in Article 14).

From the notifications that those Member States who reintroduced intra-Schengen border controls have submitted on grounds of migration, the failure of Greece either to prevent refugees from arriving in the first instance or to keep all those arriving in Greece is the main complaint (except in respect of Belgium where it is the failure of France to keep people who want to go to the UK in France). The Austrian authorities are particularly clear about this issue. The problem is that refugees arriving in Greece are entitled to seek asylum. As the reception conditions are appalling and the refugee sorting system is sclerotic in Greece, they are entitled to move on to other Member States (as the German chancellor acknowledged in August 2015). That onward movement should not turn them into 'illegal migrants' either in law or rhetoric. They are still in need of international protection, whether they be in Greece, Germany, Sweden or Belgium. The only question at issue is whether their successful attempt at 'self-relocation' should be recognised.

¹⁵² See FRA's website for regular overviews on borders and migration <http://fra.europa.eu/en/theme/asylum-migration-borders/overviews/march-2016>. A worrying development considered elsewhere in this study is the decision of the Dutch Raad van State that a person can be considered an irregularly arriving 'migrant' until such time as he or she makes an asylum claim: ABRS 24 December 2016, ECLI:NL:RVS:2015:4064

¹⁵³ CJEU (2014), C- 481/13 *Qurbani* 17 July 2014, not yet reported.

¹⁵⁴ European Union (2011), Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), Brussels, 20.12.2011 OJ L 337 (Qualification Directive).

4.7. Exceptional circumstances and the overall functioning of the Schengen area

Until 12 May 2016, the reintroduction of intra-Schengen border controls was notified on the basis of Article 28 (immediate action) – valid for two months, then Article 27, possible for six months. After this eight-month period the Member States were required to lift their intra-Schengen border controls unless Article 29 was invoked.

This article provides for exceptional circumstances where the overall functioning of the Schengen area is put at risk as a result of persistent serious deficiencies relating to external border controls. Where those circumstances constitute a serious threat to public policy or internal security within the area, border controls may be reintroduced for six months. Thereafter they may be renewed three times (to a total of two years). This procedure is a last resort measure to protect the common interests of the area and can be used only where all other measures are ineffective in mitigating the serious threat identified. Under this provision the Council may recommend that one (or more) Member State(s) decide to reintroduce border control at all or at specific parts of their internal borders.

This provision can be triggered only after an Article 21 support option has been exhausted. Under this measure, where serious deficiencies at the external border are identified in an evaluation prepared by the Commission with a view to ensuring compliance with the SBC, the Commission can recommend that the offending Member State take specific actions. These are:

- Deploy Frontex Rapid Border Intervention Teams (RABITs) to manage the offending borders;
- Submit a strategic plan based on a risk assessment to Frontex for its opinion (on effectiveness).

As 2016 moved towards the summer, the triggering of Article 29 became increasingly likely as some of the Member States applying intra-Schengen border controls considered it necessary to continue them. Consequently, the Commission carried out its assessment of Greek border controls, as Greece was most closely connected with the arrival of refugees in the EU (mainly from Turkey) and the movement of these people northwards out of Schengen into Macedonia and then back into Schengen in Hungary or Austria. The Commission found the Greek controls in need of substantial change.¹⁵⁵ The Commission identified the following timeline in its March 2016 Schengen Roadmap:¹⁵⁶

- 12 May 2016 at the latest: Greece reports on the implementation of the Council recommendations.
- 12 May 2016: If the serious deficiencies in external border control persist, the Commission will present a proposal under Article 29(2) of the Schengen Borders Code.
- 13 May 2016: If the serious deficiencies in external border control persist, the Council should adopt a recommendation under Article 29(2) of the Schengen Borders Code for a coherent Union approach to temporary internal border controls.
- 16 May 2016: The Commission presents its Third Report on Relocation and Resettlement.
- June 2016 at the latest: The co-legislators reach political agreement on the European Border and Coast Guard and adopt the legal act.

¹⁵⁵ European Commission (2016), *Assessment of Greece's Action Plan to remedy the serious deficiencies identified in the 2015 evaluation on the application of the Schengen acquis in the field of management of the external border*, COM(2016) 220, Op. cit.

¹⁵⁶ European Commission (2016), *Back to Schengen - A roadmap*, COM(2016) 120, Op. cit.

- June 2016: The Commission presents its assessment of the possibility of resuming Dublin transfers to Greece.
- August 2016 at the latest: The European Border and Coast Guard is operational.
- September 2016 at the latest: The European Border and Coast Guard has delivered the first vulnerability tests so that any necessary preventive measures can be taken.
- December 2016: If the overall situation allows, the target date for bringing to an end the exceptional safeguard measures taken.

One of the key questions is: what is the nature of the persistent serious deficiencies in the Greek external border control? From the reasons given by the Schengen states for re-introducing border controls, the arrival of 'migrants', by which they appear to mean refugees, is the most consistent. Greece cannot refuse to admit refugees without potentially placing itself in breach of the Refugee Convention, the EUCFR and the CEAS. The Greek assessment affair is discussed in chapter 5, suffice it here only to note that the Greek authorities sent their action plan to the Commission on time and provided extensive information on their external border controls and measures to be taken to enhance them.

Following the Greek response, on 4 May 2016, the Commission, in application of Article 29 of the SBC, published a proposal for a Council Implementing Decision setting out a recommendation for temporary internal border controls in exceptional circumstances putting the overall functioning of the Schengen area at risk.¹⁵⁷ This Decision, adopted on 12 May 2016, allows the maintenance of temporary border controls for a maximum of six months by Austria, Germany, Denmark, Sweden and Norway, as follows:

- Austria at the Austrian-Hungarian border and Austrian-Slovenian border;
- Germany at the German-Austrian border;
- Denmark at the Danish ports with ferry connections to Germany and at the Danish-German land border;
- Sweden in the Swedish harbours in the Police Region South and West and at the Öresund Bridge;
- Norway in the Norwegian ports with ferry connections to Denmark, Germany, and Sweden.¹⁵⁸

The proposal was adopted by the Council¹⁵⁹ with only minor amendments (see below). On 13 May Germany notified the Council and Commission that it would continue its border controls with Austria under the new legal basis¹⁶⁰ and Austria followed suit the same day, concerning its border controls with Hungary and Slovenia.¹⁶¹ Both the Commission's proposal and the Council's recommendation confirm the intersection of intra-Schengen border controls and asylum reception capacity. The first paragraph of both preambles commences: "The EU is facing an unprecedented migratory and refugee crisis following a sharp increase of mixed migratory flows since 2015. This has led to severe difficulties in ensuring efficient external border control in accordance with the Schengen acquis and in the reception and processing of migrants arriving."

¹⁵⁷ European Commission (2016), Proposal for a Council Implementing Decision setting out a recommendation for temporary internal border control in exceptional circumstances, COM (2016) 275, Op. Cit.

¹⁵⁸ Council (2016), *Council Implementing Decision setting out a Recommendation for temporary internal border control in an exceptional circumstances*, 8835/16, Op. cit.

¹⁵⁹ *Ibid.*

¹⁶⁰ German delegation (2016), *Prolongation of the temporary reintroduction of border controls at the German internal borders in accordance with Articles 29(2) of [...] the SBC*, Brussels, Council Document 8930/16, 13.05.2016.

¹⁶¹ Austrian delegation (2016) *Prolongation of the temporary reintroduction of border controls at the Austrian internal borders in accordance with Article 29(2) of [...] the SBC*, Brussels, Council Document 8947/16, 13.05.2016.

A number of aspects of the Commission's recommendation deserve attention.¹⁶² First, the recommendation presents a useful overview of the development of the legislation, the intricacies of dealing with the arrival of refugees in the EU, and the attempt by a small number of Member States to use intra-Schengen border controls as a mechanism to deflect asylum reception responsibilities. But the Commission accepted without question the justifications used by the Member States for the use of exceptional measures. Referring to the 'important secondary movements' of asylum seekers (though in the proposal they are designated as 'migrants'), the Commission focused on questions of proper documentation and/or registration not taking place in Greece. The proposed recommendation specifically states, in paragraph 14 of the preamble, that "this risk of secondary movements is particularly high for those irregular migrants [sic] who are not accommodated in adequate reception facilities". The Commission merely found that serious deficiencies in external border control permitted the use of the new legal basis for intra-Schengen controls. However, for the purposes of triggering Article 29 SBC, the Commission makes two important choices. First, it excludes the application of intra-Schengen controls at air or sea borders, thus placing what one might call a travel mode limitation on the use of Article 29 SBC. The only source of serious threat is the movement of persons across land borders. This will ensure that the Greek economy is not hindered over the summer months by the application of intra-Schengen border controls on the flights and ferries so vital to its tourism industry. Secondly, the Commission specified carefully exactly which borders could be subject to controls (see above). By extension, this means that other borders cannot be subject to intra-Schengen controls under this proposal. The Commission appears to anticipate that there will be a gradual lifting of these exceptional border controls and that the application of the Article 29 SBC procedure will terminate at the end of 2016.

The Council's recommendation made a few changes to the text proposed by the Commission. First, in paragraph 11 of the preamble regarding the appropriateness of using intra-Schengen border controls to displace asylum reception obligations, it added that that "these measures are necessary and are considered proportionate." Further, to address the complaint of some Member States that their neighbouring states introducing the controls had failed to consult or notify them, the Council added in Article 1 "Before introducing such controls the Member State concerned should exchange views with the relevant neighbouring Member State(s) with a view to ensuring that internal border controls are proportionate, in accordance with the [SBC]".

Finally, the commitment of the Council and the Commission to ending the intra-Schengen controls is made clear in Article 3 of the recommendation, which states that the controls permitted under it should be targeted and limited in scope, frequency, location and time, to what is strictly necessary to respond to the serious threat and to safeguard public policy and internal security. Further, the Member States are required to carry out regular reviews and adjust controls to the level of threat addressed, including phasing them out wherever appropriate.

The policy adopted by the Commission and the Council as regards the reintroduction of intra-Schengen border controls appears to be to allow the Member States a wide latitude as regards the grounds for the introduction of controls. No systematic or comprehensive assessment of the grounds provided by the Member States using the powers was undertaken. Indeed, there is little to indicate that the Commission used its power to request additional information, except in one or possibly two cases. On the other hand, both the Commission and the Council are seeking to manage the situation by limiting the types of controls that can be carried out

¹⁶² Those aspects of the Proposal which relate to the Greek assessment are addressed in Sub-Section 5.1.

and the places where this can be done. There seems to be a containment policy at work, which will gradually squeeze the space for controls down to nothing. The notification obligations on Member States using the Article 29 SBC exception are likely to be applied intensively under the Commission's supervision. This will concentrate the minds of the civil servants who are charged with justifying the continued use of Article 29 of the SBC.

4.8. Informal borders and fences

Instead of the formal temporary reintroduction of internal border controls on the basis of Article 25 of the SBC, Member States such as the Netherlands have used Article 23 of the SBC (formerly Article 21) as a legal basis to enhance police checks in response to the increasing numbers of migrants. Other Member States, such as Hungary and Austria, opted for even farther-reaching measures, such as building fences. Though all these measures indicates that the line between border control and other internal security measures is increasingly blurring.

4.8.1. Border control as a contribution to EU internal security

Current controversies over the governance of the Schengen area need also to be understood in the context of a transformation of how border control relates to EU policy in the field of internal security. Internal and external border control measures are increasingly associated with, and embedded within, the concerns and priorities of EU internal security, rather than simply involving the issue of controlling access to the territory of the Member States of the European Union.

The association between access control and internal security is clearly shown in the April 2016 communication of the European Commission on "Stronger and Smarter Information Systems for Borders and Security"¹⁶³ accompanying the proposal for the establishment of an Entry/Exit System.¹⁶⁴ The communication argues for "the need to join up and strengthen the EU's border management, migration and security cooperation frameworks and information tools in a comprehensive manner", pointing out that "[b]order management, law enforcement, and migration control are dynamically interconnected".¹⁶⁵ The argument concerns in particular counter-terrorism policy, but also touches upon EU measures related to organised crime, and is framed in terms of "gaps" in "the very broad spectrum of data"¹⁶⁶ already accessible and available to border control and law enforcement authorities in the EU, including to EU JHA agencies.¹⁶⁷ The "joining up" of border control and internal security, then, is operationalised in particular through an extensive discussion of interoperability. The Commission recommends considering four steps, including the development of a single search interface "to query several [border control and law enforcement] information systems simultaneously and to produce combined results on one single screen", interconnectivity of information systems that would allow systems to automatically consult the data they respectively contain, the sharing of a single biometric matching service, and a common repository of data for information systems.¹⁶⁸ Beyond this specific communication and proposals, the joining up of border control and policing also informs other initiatives. This concerns in particular the new ECBG, where, according to the interviews conducted for the

¹⁶³ European Commission (2016), *Stronger and Smarter Information Systems for Borders and Security*, COM(2016) 205 final, Brussels, 6.4.2016.

¹⁶⁴ European Commission (2016), *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the use of the Entry/Exit System*, COM(2016) 196 final.

¹⁶⁵ European Commission (2016), *Stronger and Smarter Information Systems for Borders and Security*, COM(2016) 205 final, Brussels, 6.4.2016, p. 2.

¹⁶⁶ *Ibid.*, p. 12.

¹⁶⁷ See Annex 2 for further analysis.

¹⁶⁸ European Commission (2016), *Stronger and Smarter Information Systems for Borders and Security*, *Op. cit.*, p. 14.

study, the new body would have access to SIS II, in addition to having use of Eurodac for return operations¹⁶⁹.

In many ways, these proposals echo earlier measures called for by the European Commission and by the Council in the context of information management for the area of freedom, security and justice.¹⁷⁰ How they meet current concerns with EU internal and external borders is therefore unclear. In the meantime, the closer association advocated between access control and internal security should raise questions. Access/border control is a specific concern, which involves dealing with, at times, particularly vulnerable individuals who should benefit from specific rights and protections. Making border control an integral part of internal security measures, in this respect, may well undermine the specific challenges and priorities associated with this subject matter, and further weaken the status of already vulnerable persons (see Annex 2 for further analysis).

4.8.2. Police checks at internal borders – the line remains unclear

Police checks within the territory, including border areas, are allowed insofar as the exercise of these police powers does not have an effect equivalent to border checks. 'Border checks' are defined in Article 2 of Regulation 2016/399 as 'checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the member states or authorised to leave it'. Article 23(a) of the SBC clarifies that the exercise of police powers shall not have the objective of border controls; they must be based on general police information and experience 'regarding possible threats to public security and aim, in particular, to combat cross-border crime'. Furthermore they must be devised and executed in a manner clearly distinct from systematic checks on persons at the external borders, and carried out on the basis of 'spot checks'.

In its case law, the Court of Justice of the European Union (CJEU) has provided further criteria on this use of police checks to ensure these checks would not have an effect equivalent to 'border checks' as prohibited in Article 22 of the SBC.¹⁷¹ In *Melki and Abdeli*, the CJEU affirmed that Articles 22 and 23 (former 20 and 21) of the SBC also apply to border areas within 20km of the internal borders and prohibit national legislation granting national police authorities the power to check the identity of any person, 'irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order'.¹⁷² Based on this criterion, Schengen States are obliged to specify, in their national rules, the criteria for using, and the frequency of, the internal borders controls to be applied. From the wording of 23(a)(ii) (former 21) of the SBC, one can deduce that police checks in border areas should specifically address public security threats, such as cross-border crimes. In the *Adil* judgment, the CJEU, responding to a question of a Dutch court assessing the lawfulness of mobile police checks, held that police checks within the border areas with the objective of combating illegal residence would not be prohibited under Article 23(a)(ii) (former 21) of the SBC.¹⁷³ However, these checks must be based on 'general information and experience

¹⁶⁹ See Articles 6a and 43 of Regulation (EU) 2016/... of the European Parliament and of the Council of ... on the European Border [and Coast] Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, and amending Regulation (EU) 2016/399 of the European Parliament and of the Council (not yet published in the OJ, agreed in LIBE committee on 27.06.2016)

¹⁷⁰ European Commission (2010), *Overview of information management in the area of freedom, security and justice*, COM(2010) 385 final, Brussels, 20.7.2010; Council (2014), *Draft Council Conclusions on an updated Information Management Strategy (IMS) for EU internal security*, 15701/1/14 REV1, Brussels, 24.11.2014.

¹⁷¹ Article 22 of the SBC reads: "Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out".

¹⁷² CJEU (2010), C-188/10 and C-189/10, *Melki and Abdeli*, 22 June 2010.

¹⁷³ CJEU (2011), C-278/12 PPU, 19 July 2012, *Adil*, para 65-67.

regarding the illegal residence of persons at the places where the checks are to be made' and the carrying out of those checks must be subject 'to certain limitations concerning, inter alia, their intensity and frequency.' With this conclusion, allowing the use of police checks in border areas for immigration control purposes on the basis of Article 23(a), the CJEU made a direct connection between irregular immigration and possible threats to public security.

Taking into account this CJEU case law, the Dutch rules on internal border controls were amended in 2014 to intensify the frequency and duration of mobile border checks in the border areas ('MTV' checks' or 'Mobiël Toezicht Veiligheid').¹⁷⁴ At the same time, a new rule was added according to which, on a temporary basis, the controls at both land, sea, and air borders could be intensified in the case of 'a sudden or expected increase of irregular migrants crossing at the borders'. In this situation, which requires a decision of the State Secretary of Security and Justice, the maximum number of border checks is doubled.¹⁷⁵ This power of intensified police checks was used for the first time in September 2015, in response to the increasing number of refugees arriving in the Netherlands. The decision to use this power was amongst other things, based on the justification to 'prevent human smugglers from misusing the vulnerable position of asylum seekers'. Since September 2015, the Dutch government has extended the use of this exceptional power for border checks several times.¹⁷⁶ In this latter decision, also referring to the terrorist attacks in Paris on 13 November, the Secretary of State mentioned three goals of these intensified border checks:

- fighting irregular migration and human smuggling;
- preventing humanly degrading incidents (such as people dying in trucks), and;
- preventing substantial public order and national security incidents in the Netherlands.

In looking at case law assessing the legitimacy of these intensified border checks, which was necessary to decide on the lawfulness of the detention of migrants caught during these checks, two Dutch courts reached opposite decisions in 2015.¹⁷⁷ Whereas the Groningen court found that the decision of 16 October 2015 on the use of intensified border checks did not violate the conditions included in the SBC, the Rotterdam court held the Dutch reasons for deploying this measure invalid. The latter court decision was annulled by the highest administrative court in December 2015.¹⁷⁸ According to this court in the Netherlands, the Dutch government legitimately considered the influx of asylum seekers as a specific indication of an expected increase of irregular migration in the near future, which justified the use of intensified border controls. The main argument of the Dutch court in coming to this conclusion was that asylum seekers are irregular migrants at the time they cross the internal borders of the EU and before they apply for asylum. This classification of asylum seekers as illegal immigrants is problematic for two reasons. First, it allows the extended use of internal border checks, contrary to the purposes of the SBC. Second, based on this

¹⁷⁴ Decision of 2 July 2014, published in the Dutch Official Journal (*Staatsblad*) 2014, no. 250. Generally, these rules provide that on a daily basis, twenty trains may be checked, of which only three trains for each 'connection/line'. In each train only one part may be examined, of which a maximum of four wagons. Dealing with the prevention of irregular immigration, the Dutch rules provide that border checks may be performed for a maximum of 90 hours per month, of which six hours a day.

¹⁷⁵ In practice this means that, for border checks on motorways, the maximum time of border checks is 180 hours a month, of which 12 hours a day.

¹⁷⁶ 16 October 2015, 23 November 2015, 1 February 2016 and most recently 2 March 2016. See the information sent to the Dutch parliament, Second Chamber 2015-2016, 19637, no. 2077 and *Staatscourant* 2016, no. 5616, 11 April 2016.

¹⁷⁷ District court Groningen (2015), 16 November 2015, AWB 15/9361; and District court Rotterdam (2015), 3 December 2015, AWB 15/19730, *JV* 2016/22.

¹⁷⁸ Dutch highest administrative court (2016), Afdeling Bestuursrechtspraak Raad van State, 24 December 2015, ECLI:NL:RVS:2015:4064.

classification of asylum seekers as illegal migrants, the highest Dutch court allowed their detention on the basis of regular migration rules, which is in violation of asylum laws.¹⁷⁹

Dutch practice and case law illustrate that the line between border controls and checks, defined in Article 2 of the SBC and prohibited at the internal borders according to Article 22 of the SBC on the one hand, and police checks as allowed in Article 23 SBC, on the other, is blurred. Contrary to the application of Article 25 of the SBC for the temporary reintroduction of border controls, the use of border checks, according to Article 23, is more ambiguous, both concerning the purpose for which they are used (public security or immigration control?) and the conditions under which these controls may take place. What is the point of prohibiting checks to ensure that people are allowed to enter or to leave the territory at the internal borders between Schengen states, if exactly the same objective can be achieved by Member States allowing police checks within 20km of the internal borders to prevent irregular immigration? With regard to the conditions for police checks, it is important to note that the use of intensified border checks as performed by the Dutch authorities does not require the prior notification of the Commission or other Member States. Furthermore, the criteria included in Article 25 of the SBC do not apply, such as the presence of a serious threat to public policy or internal security and the condition that border controls may only be reintroduced as measure of 'last resort'.¹⁸⁰ Thus, questions remain not only on the intensity and the circumstances under which border checks may be applied in order to ensure that these checks are not equivalent to border controls, but also with regard to the implied purposes of border checks and controls.¹⁸¹

In January 2016, a German lower court (the *Amtsgericht Kehl*), dealing with a person suspected of the illegal import of drugs, submitted a preliminary question to the CJEU on whether the police checks, on which the prosecution was based, were allowed under Articles 23 and 24 (former 20 and 21) of the SBC, if these police checks had been applied irrespective of the individual behaviour of the person at stake and the specific circumstances, and in the absence of any temporary reintroduction of border controls at the relevant internal border.¹⁸² Although the questions of the German court did not specifically address the use of border checks for the purpose of immigration control, the answers of the CJEU might provide further clarification on the legitimacy of border checks within the internal border areas under Article 23 (former 21) of the SBC.

4.8.3. Fences: a solution permitted only for external borders?

The increasing number of asylum seekers arriving in Europe in 2015 resulted in several unilateral actions by Member States, including the setting up of physical barriers at both internal and external borders of the Schengen area. The first MS to build fences at internal borders was Hungary, as Hungarian authorities reportedly started building a fence with Slovenia to re-direct the flow of refugees.¹⁸³ Subsequently the fence with Slovenia was demolished and Hungary continued to build fences on its external borders with Croatia and Serbia. In February 2016, Prime Minister Viktor Orban announced his intention to develop a

¹⁷⁹ See the annotation of Evelien Brouwer to this judgment, *JV* 2016, no. 54 (in Dutch).

¹⁸⁰ In the Netherlands, the government promised only following the advice of the Dutch Advisory Committee on Migration Affairs, to inform the European Commission on a 'confidential basis' about the use of intensified border checks, Explanatory memorandum to the Decision of 2 July 2014, *Staatsblad* 2014, no. 250 p. 9.

¹⁸¹ Cornelisse, G. (2014), "What is wrong with Schengen? Border disputes and the nature of integration in the area without internal borders," *Common Market Law Review* 51: p. 741-770.

¹⁸² CJEU (2016) C-9/16, submitted 7 January 2016 (unpublished case).

¹⁸³ *Novinite (Sofia News Agency)*, "Hungary Starts Building Razor-Wire Fence along Border with Slovenia," September 24, 2015. URL: <http://www.novinite.com/articles/170976/Hungary+Starts+Building+Razor-Wire+Fence+along+Border+with+Slovenia>.

280-mile-long razor-wire barrier at the southern borders of Hungary.¹⁸⁴ Slovenia began erecting a similar fence with Croatia¹⁸⁵ and Austria announced that it would start building fences at its internal borders. After severe criticism by the European Commission in April 2016 of the plans for fences at the borders with Italy at the Brenner Pass, the Austrian government announced, on 13 May 2016, that it would withdraw this plan.

4.9. No complaint – No Impact on free movement of persons?

The above legal analysis indicates the weight attributed to the free movement of persons across the EU, as one of the greatest achievements of Schengen. Nevertheless, none of the notifications have elaborated on how the measures will be applied in a way that least impinges upon free movement. The Commission seemed to be satisfied with the formula used by the Member States that the measures would be used if “strictly necessary”.¹⁸⁶ In addition, Commission officials explained that no official complaints had been received regarding the internal borders impinging upon the free movement of the EU citizens.¹⁸⁷ Nevertheless, there is a noticeable growing concern among EU citizens and in particular among youth organisations who actively advocate the free movement of persons within the Schengen area.¹⁸⁸ The campaigns such as “Don’t Touch My Schengen” or “Schengen Watch” show the increasing concern about the lack of legal certainty as regards free movement rights. Youth organisations mentioned their personal experiences of being stopped by police at internal borders and subjected to what looked like a border control.¹⁸⁹

The lack of transparency and legal certainty is raising more questions among EU citizens. For example, the European Citizens Action Service (ECAS), which runs “Your Europe Advice” providing legal advice for mobile EU citizens, has experienced a 9.4% increase in enquiries in 2015 compared to 2014, which is indicative of an increasing sentiment of uncertainty among citizens about the practical implementation of free movement.

¹⁸⁴ Nick Gutteridge, “The Great Wall of Europe: Hungary splits continent in two with huge fence to stop migrants,” February 29, 2016 in *Express.co.uk* at <http://www.express.co.uk/news/world/648269/Hungary-plan-fence-border-Romania-migrants-refugees-crisis-Viktor-Orban-Schengen>.

¹⁸⁵ Barbara Surknov, “Slovenia Builds Border Fence to Stem Flow of Migrants,” November 11, 2015 in *New York Times*. URL: http://www.nytimes.com/2015/11/12/world/europe/slovenia-border-fence-migrants-refugees.html?_r=0; Simon Tomlinson, “Will a fence halt the human tide flowing into Slovenia? Country becomes latest to build barriers along its borders as 47,500 migrants arrive in just a few days,” 23 October 2015 in *Daily Mail*, <http://www.dailymail.co.uk/news/article-3286365/Slovenia-latest-country-resort-building-fences-borders-47-500-migrants-enter-overwhelmed-nation-days.html>.

¹⁸⁶ Interview with Commission, DG Justice, 08.06.2016 and interview with the Commission. DG HOME, 17.05.2016.

¹⁸⁷ Interview with Commission, DG Justice, 08.06.2016 and interview with the Commission. DG HOME, 17.05.2016.

¹⁸⁸ See Annex 4, Stakeholders discussion on 07.06.2016.

¹⁸⁹ See Annex 4, Stakeholders discussion on 07.06.2016.

5. IS THE SCHENGEN EVALUATION AND MONITORING MECHANISM FIT FOR PURPOSE?

KEY FINDINGS

- The relationship between the Frontex 'risk assessment' of the capacity of Member States to face threats and pressure at the external borders and the information on Member States 'subject to particular pressure' collected by European Asylum Support Office is unclear.
- The relationship between the proposed 'vulnerability assessment' of the new European Border and Coast Guard (EBCG) and the existing Schengen Evaluation and Monitoring mechanism has been defined in the new EBCG Regulation, though it is not clear how it will be implemented in practice.
- There is a lack of information on pending infringement procedures dealing with alleged violations of the Schengen Borders Code by Member States. This hampers democratic debate on the necessity and proportionality of the reintroduction of border controls or police checks at the border areas.

5.1. Results of the Schengen Evaluation and Monitoring Mechanism

The SEM contains assessments of both external and internal borders, with the latter one of the innovations of the Schengen governance reform.¹⁹⁰ The evaluation involves questionnaires sent to MS, as well as announced and unannounced visits.

5.1.1. Evaluation of external borders

The SEM Regulation states that a team of experts from the Member States and the Commission - with relevant EU agencies as observers - can carry out an evaluation of the application of the Schengen *acquis*. The SEM provides a range of evaluations, from the management of external and internal borders to returns, the SIS, the VIS, and judicial and police cooperation. Article 10 of the SEM provides for the composition of teams for both announced and unannounced on-site visits. Article 11 of the SEM provides the basis the questionnaire to be sent to MS. This sub-section further analyses the outcomes of regular SEM external border evaluations conducted in Greece, Austria, Sweden, Belgium and Poland.

5.1.1.1. Greece

An external borders evaluation team visited Greece from 10 to 13 November 2015, during the very peak of the refugee crisis, to conduct an unannounced on-site evaluation visit. Experts went to Greek sea border sites (Chios and Samos Islands) and land border crossings with Turkey (Orestiada, Fylakio, Kastanies, Nea Vyssa).

In the annual evaluation programme for 2016, the announced on-site visits to Greece were planned for April 2016 as one of six or seven MS to be evaluated in that year. Apparently, in the second section (non-published part) of the annual evaluation programme for 2015, an unannounced visit to Greece was planned for November 2015.

When making decisions, the Commission applies Article 38 of the SBC, using 'the committee procedure' within the scope of Regulation No 182/2011 meaning that the decision-making remains secret and is led by DG HOME, with consultation with all the relevant Commissioners

¹⁹⁰ Interview with an MEP, 01.06.2016.

and the President. This comitology procedure explicitly excludes MEPs and thus lacks democratic accountability.

Following such a procedure, on 2 February 2016, the Commission adopted a report detailing the findings and assessments, and listing best practices and deficiencies identified during this evaluation.¹⁹¹ There were suggestions that this draft report was modified on its way up the Commission hierarchy. Allegedly, the political context and pressure from MS eager to maintain border controls were also important for reaching these conclusions.¹⁹² According to this report, the on-site visit revealed serious deficiencies in the carrying out of external border control by Greece, in particular due to the lack of appropriate identification and registration of irregular migrants on the islands, of sufficient staff, and of sufficient equipment for verifying identity documents. However, during the 21 March 2016 LIBE Committee meeting, the Greek authorities admitted to a lack of EURODAC machines on the small islands, though not SIS II machines.¹⁹³

According to the Commission, under the current circumstances, situational awareness and reaction capability are not sufficient for effective border surveillance. The Commission's choice of words is severe: the serious deficiencies relating to external border control in Greece 'constitute a serious threat to public policy and internal security and put at risk the overall functioning of the area without internal border control'. The Commission report, which focuses solely on Greece, emphasises failures in Greek border management without taking so much into account that other Member States may not have fulfilled their obligations in assisting Greece. Thus, the Commission sent a subliminal message that any country alone would not be able to manage border controls under such pressure, but then found Greece guilty for not managing them.

In a decision of 12 February 2015, the Council adopted a recommendation addressing 'serious deficiencies' identified in the 2015 evaluation on the application of the Schengen *acquis* in the field of external border management by Greece, including during the un-announced on-site visit in November 2015 to the external borders.¹⁹⁴ In this recommendation, 49 points were listed, covering the registration procedure, border surveillance, risk analysis, international cooperation, human resources and training, border checks procedure, and infrastructure and equipment. In accordance with Article 15(3) of the SEM, this recommendation was sent to the European Parliament and the national parliaments.

This Council Decision was followed by a Commission Implementing Decision of 24 February 2016, setting out recommendations on specific measures to be taken by Greece.¹⁹⁵ The Commission's recommendation was based on Article 29 SBC and the Council's recommendation on Article 15 (3) of the SEM. The Decision of the Commission included 14 measures. These measures partly covered the same fields as the Council recommendation (border surveillance and border checks, registration, and identification), with the exception of international cooperation, and including measures dealing with the reception and return of

¹⁹¹ European Commission (2016), Commission Implementing Decision in accordance with Article 14(5) of Regulation (EU) No 1053/2013 of 7 October 2013, Brussels, 02.02.2016.

¹⁹² Interviews with Council, 19.05.2016, German Permanent Representation, 27.05.2016 and Slovenian Permanent Representation, 30.05.2016.

¹⁹³ LIBE Committee (2016), LIBE hearing on 21.03.2016, Discussion on the situation of the Schengen area.

¹⁹⁴ Council (2016), Council Implementing Decision setting out a Recommendation on addressing the serious deficiencies identified in the 2015 evaluation of the application of the Schengen *acquis* in the field of management of the external borders by Greece, Council document 5985/16, Brussels, 12.02.2016.

¹⁹⁵ European Commission (2016), Commission Implementing Decision of 24.2.2016 setting out a recommendation on specific measures to be taken by the Hellenic Republic following the evaluation report of 2 February 2016, C(2016) 1219 final, Brussels, 24.2.2016.

irregular migrants and funding. The Greek authorities were requested to report to the Commission no later than 12 March 2016 on the measures taken to implement the recommendations. In the meantime, the Commission published its "Back to Schengen" Communication, setting a deadline of 12 May for taking a decision under Article 29, the date coinciding with the end of German and Austrian internal border controls.¹⁹⁶

Based on the assessment of the Action Plan presented by the Greek government, the Commission published an adequacy assessment on 12 April 2016.¹⁹⁷ Meanwhile, another announced visit to Greece took place between 10 and 16 April 2016. In the adequacy assessment, the Commission found that 'significant progress' had been made by Greece, but that, for many actions, more clarity was needed in terms of timing, responsibility and financial planning. Whereas some actions could not be adequately addressed or completed, for other actions additional information was needed. To provide this further information, the Greek authorities were given until 26 April 2016. According to the Commission, the Hellenic government provided the requested additional elements and clarifications on its Action Plan by the deadline, though the Commission gave no further details on the actual measures or actions adopted.¹⁹⁸

5.1.1.2. Austria

In November 2015, the Council adopted a recommendation with remedial actions for Austria to address the deficiencies identified during the Schengen evaluation in the field of management of the external border carried out in 2015.¹⁹⁹ The 18 recommendations covered the integrated border management strategy, inter-agency cooperation, risk analysis system, training of border guards, border checks (including the recommendation to pay particular attention to minors and stamping of documents of family members of Union citizens), and procedures at the Salzburg and Vienna airports. The evaluation team assessed how privacy is ensured during the performance of interviews in the 'second line checks', when the person is brought to a separate location for further investigation on whether he/she meets all entry conditions for third-country nationals. Furthermore, based on the 2015 Schengen evaluation on Austria addressing deficiencies in the return policy, the Council adopted a decision including recommendations dealing with this field.²⁰⁰ In February 2016, the Council adopted recommendations addressing deficiencies identified in the 2015 evaluation in the field of the SIS.²⁰¹ In response to the recommendations on the external borders and return, Austria submitted action plans which were not published in the Council Registry.²⁰²

¹⁹⁶ European Commission (2016), *Back to Schengen - A roadmap*, COM(2016) 120 final, Op.cit.

¹⁹⁷ European Commission (2016), *Assessment of Greece's Action Plan*, COM (2016) 220 final, Op.cit.

¹⁹⁸ European Commission (2016), Commission proposal for a Council Implementation Decision setting out a recommendation for temporary internal border control in exceptional circumstances, COM (2016) 275, p. 5.

¹⁹⁹ Council (2015) *Schengen evaluation of Austria - Council Recommendation on addressing the deficiencies identified in the 2015 evaluation on the application of the Schengen acquis in the field of management of the external border*, Council doc. 14067/15, Brussels, 17.11.2015; Based on the European Commission (2015) Commission Implementing Decision, C(2015)6144 (not public).

²⁰⁰ Council (2015) Schengen evaluation of Austria - Council Recommendation on addressing the deficiencies identified in the 2015 evaluation of the application of the Schengen acquis in the field of Return, Council document 15435/15, Brussels, 17.12.2015; based on the European Commission (2015) Evaluation report of the Commission, C(2015) 6341 of 05.10.2015 (not public).

²⁰¹ Council (2016) Proposal for a Regulation of the European Parliament and of the Council amending Regulation No 562/2006 (EC) as regards the reinforcement of checks against relevant databases at external borders, Council document 6390/16, Brussels, 24.02.2016.

²⁰² For the Action plan dealing with the recommendations on external air borders, see: Austrian delegation (2015) Council document 6761/16, 03.03.2015; with regard to recommendations on return, see: Austrian delegation (2016), Action Plan of Austria of 16 March 2016, Council document 7258/16, 31 March 2016. These action plans are published at www.statewatch.org.

5.1.1.3. Sweden

On 15 March 2016, the Council adopted 15 recommendations addressing the deficiencies identified in the 2015 evaluation of Sweden's application of the Schengen *acquis* in the field of management of the external borders.²⁰³ These recommendations included the preparation by Sweden of a concrete multi-annual action plan for the implementation of the national plan for integrated border management.

Furthermore, it was recommended that Sweden take further measures in the field of human resources, training of officers performing border checks, the infrastructure at airports (including the optimising of the location of control booths to ensure the possibility of profiling), and border checks (including the improvement of the application of border checks procedures). It was also recommended that Sweden provide border guards with risk analysis products concerning the fight against terrorism and instructions to regularly use the technical means available for detecting false/falsified documents when performing checks on all categories of persons).

5.1.1.4. Belgium

In the 2015 evaluation on the implementation of the Schengen *acquis* by Belgium, the European Commission found deficiencies in the field of police cooperation, common visa policy, the SIS, and return. These recommendations were adopted in the period February - April 2016 by the Council.²⁰⁴

5.1.1.5. Poland

In December 2015, the Council adopted recommendations dealing with the deficiencies in the implementation of the *Schengen acquis* in the field of the SIS in Poland based on the Schengen evaluation by the Commission in 2015.²⁰⁵

With respect to the the deficiencies identified in the 2015 evaluation on the application of the *Schengen acquis* by Poland in the field of management of the external land border with Ukraine, the Commission drafted a (not publicly accessible) proposal for a Council recommendation in May 2016.²⁰⁶

5.1.2. Bi-annual reports on the functioning of the Schengen area

Since 2012, the European Commission has submitted bi-annual reports to the European Parliament and the Council on the functioning of the Schengen area. In its seventh bi-annual report on the functioning of the Schengen area, covering the period between 1 November 2014 and 30 April 2015, the Commission addresses in particular the different measures taken

²⁰³ Council (2016), *Council Implementing Decision setting out a Recommendation on addressing the deficiencies identified in the 2015 evaluation of Sweden's application of the Schengen acquis in the field of management of the external borders*, Council Document 7124/16, Brussels, 15.03.2016.

²⁰⁴ In the following Council Implementing Decisions: of 27 February 2016 with regard to the deficiencies in the field of the Schengen Information System, Council (2016), Council document 6200/16; of 8 March 2016 dealing with the deficiencies in police cooperation, Council (2016) Council document 6846/16; and two decisions of 5 April 2016, dealing with return and the common visa policy, respectively Council (2016), Council document 7533/16 and Council (2016), Council document 7536/16.

²⁰⁵ See Council (2015), *Schengen evaluation of Poland - Council Recommendation on addressing the deficiencies identified in the 2015 evaluation of the application of the Schengen acquis in the field of the Schengen Information System*, Council document 15108/15, Brussels, 07.12.2015, based on the evaluation in European Commission (2015), COM (2015) 457 (not public).

²⁰⁶ Council document 9691/16, 31.05.2016 (not public).

by the Member States in response to the increasing numbers of asylum seekers and irregular border crossings.²⁰⁷ The Commission addressed other alleged violations of the *Schengen acquis*, including alleged push-back practices at the external borders by Greece and Bulgaria, summary removals from Spain (Ceuta and Melilla), and excessive waiting times caused by checks by Spanish authorities in Gibraltar. The Commission asked Polish authorities to take necessary measures to amend the bilateral agreement with Ukraine to ensure that the shared border crossing points meet relevant safeguards included in the SEM.

In the seventh bi-annual report, the Commission emphasises the added value of on-site visits under the new Schengen evaluation mechanism and the fact that all aspects of the Schengen *acquis* are evaluated over two months. The first two evaluations under this new regime took place in Austria (February-March 2015) and Belgium (April-May 2015). The new Schengen evaluation mechanism allows for unannounced visits: the first of which took place in Sweden early March 2015. In Poland a revisit took place on 25-27 March 2015, dealing with the evaluation of the use of SIS/Sirene.²⁰⁸ At the time of the publication of the seventh bi-annual report (May 2015), the reports of these visits were still to be finalised.

In December 2015, the Commission published its eight bi-annual report.²⁰⁹ In this report, the Commission refers to the terrorist attacks in Paris of 13 November 2015, but also to the unprecedented number of migrants arriving in the Schengen area, taking into account different measures adopted by the MS at their internal borders in response to these developments. Addressing the temporary reintroduction of internal border controls by different MS in order to better manage secondary movements, the Commission finds that it must remain a temporary measure 'helping to bring the situation back to normal'. Dealing with the Schengen evaluation mechanism, the Commission reports that two announced visits were carried out in the Netherlands and Germany, covering all the policy areas and that results of the earlier visits to Austria and Belgium have become available. During the reporting period, unannounced visits took place in Spain and Hungary addressing the management of external border controls.

5.1.3. Infringement procedures initiated by the Commission

Only a few procedures have been initiated by the European Commission dealing with alleged infringements of the SBC in accordance with Article 258 TFEU:²¹⁰

- 19 February 2009: reasoned opinion against France based on the Schengen Borders Code, procedure closed 26 January 2012 (2008/2024).
- 24 October 2012: formal notice against Austria for alleged infringement of Article 22 of the Schengen Borders Code, procedure closed 28 March 2014 (2012/2121).
- 24 October 2012: formal notice against Slovakia for alleged infringement of Article 22 the Schengen Borders Code, procedure closed 28 March 2014 (2012/2123).
- 16 October 2014, formal notice against Germany for non-compliance of the German 'Bundespolizei Gesetz' with Art 20 and 21(a) SBC, still pending (2014/4130).

Furthermore, in its sixth report on the evaluation of Schengen, the Commission mentioned an infringement procedure dealing with Czech law obliging carriers to carry out systematic

²⁰⁷ European Commission (2015), *Seventh bi-annual report on the functioning of the Schengen area 1 November 2014 - 30 April 2015*, COM(2015)236, Brussels, 29.5.2015.

²⁰⁸ SIRENE stands for Supplementary Information Request at the National Entries.

²⁰⁹ European Commission (2015), *Eighth biannual report on the functioning of the Schengen area 1 May - 10 December 2015*, COM(2015) 675, Strasbourg, 15.12.2015.

²¹⁰ See European Commission, DG HOME website (2016), "Browse infringements of EU Home Affairs law", *EU law monitoring*. URL: http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements_by_policy_border_management_and_schengen_en.htm (last update 29 April 2016). This website does not give any information on which specific provision of the SBC has not been complied with.

checks on persons crossing the internal borders. The procedure was closed in 2014. According to the Commission, the Czech Republic had modified its legislation to make it compatible with EU law.²¹¹

Thus, based on this information, only the procedure against Germany is still pending. In 2014, members of the German parliament (*Bundestag*) submitted questions on this procedure, asking for information about the specific criticisms of the Commission with regard to non-compliance with the SBC and the conclusions the Federal German government drew from this procedure.²¹² The Federal Government replied that the European Commission raised legal concerns regarding Section 23 paragraph 1 number 3 of the Federal Police Act (BPolG), asking Germany to specify restrictions with respect to the intensity and frequency of checks. According to the German government the national legislation is compatible with the SBC and was to be discussed with the Commission at the beginning of 2015, after which the Federal Government would give its opinion. In 2015, the Federal government, despite repeated enquiries by members of the German parliament, refused to submit the letter of formal notice of the Commission in this infringement procedure.²¹³ The Federal government based this refusal on a German act on the cooperation between government and parliament on EU matters, obliging it to submit information on infringement procedures dealing with directives, but not regulations. Due to this lack of specific information, it is unclear whether the infringement procedure initiated by the Commission deals with the same issues as submitted by the court of Kehl (Amtsgericht) in the preliminary questions to the CJEU of January 2016 (see above). Nevertheless, it seems that the Commission is not planning to go further on this question.²¹⁴

The interviews carried out during this study revealed that there is a lack of knowledge about the infringement procedures due to issues of information handling, in particular in the provision of information to the national and the European Parliaments (see Sub-section 3.2. for more information).

5.2. Role of EU agencies in the evaluation of external borders management and capacities

This sub-section provides an assessment of the role given to EU agencies such as Frontex, EASO and the FRA in the Schengen monitoring and evaluation system.

5.2.1. Role of Frontex

5.2.1.1. Frontex risk analysis

The tasks of Frontex (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union) are regulated in Council Regulation 2007/2004, amended by Regulation 1168/2011.²¹⁵ Article 2 of the Frontex Regulation provides for an assisting and coordinating role for Frontex, for example, in providing assistance to Member States in training their border guards and in the establishment of common training standards.

²¹¹ European Commission (2014), *Sixth bi-annual report on the functioning of the Schengen area 1 May - 31 October 2014*, COM(2014)711, Brussels, 27.11.2014, p. 5.

²¹² Bundestag Drucksache 18/3464, 22 December 2014.

²¹³ Bundestag Drucksache 18/4149, 27 February 2015, p. 2.

²¹⁴ Interview with German Permanent Representation, 27.05.2016.

²¹⁵ European Communities (2004), *Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, OJ L 349, Brussels, 25.11.2004, amended by the European Union (2011), Regulation 1168/2011, OJ L 304, Brussels, 22.11.2011.

Frontex plays a role in carrying out risk analyses, including the assessment of the capacity of Member States to face threats and pressure at external borders, and the conducting of research relevant for the control and surveillance of external borders. For the purposes of its risk analyses, the Agency may assess, on the basis of Article 4 of the Frontex Regulation, after prior consultation with the Member States concerned, 'their capacity to face upcoming challenges, including present and future threats and pressures at the external borders of the Member States'. This is expected to be of particular relevance for those Member States facing specific and disproportionate pressures. To that end, Frontex may assess the border control equipment and resources of the Member States. The assessment shall be based on information given by the Member States concerned, and on the reports and results of joint operations, pilot projects, rapid interventions and other activities of the Agency. Article 4 explicitly mentions that these assessments by Frontex are without prejudice to the SEM. However, as indicated in Section 3.2, the risk analyses prepared by Frontex are used for the preparation of the visits to Member States for the five-yearly evaluations on the basis of Article 43 of the SBC. Furthermore, Article 7 of SEM requires Frontex to carry out yearly risk analyses for all Member States as a basis for the preparation of the annual evaluation programme for announced and unannounced on-site visits by expert teams. Article 7(2) includes the sentence: "The Commission may at any time request Frontex to submit to it a risk analysis making recommendations for evaluations to be implemented in the form of unannounced on-site visits." Thus, it seems that the Commission has more leverage in terms of timing to arrange unannounced visits without waiting for the annual Risk Analysis.

Although not (directly) related to its tasks in evaluation, it is worth noting that, with the 2011 amendment, Frontex has been granted more operational tasks, including the coordination or organisation of joint return operations, the setting up of European Border Guard Teams to be deployed during joint operations, pilot projects and rapid interventions, and the development and operation of information systems enabling 'swift and reliable exchanges of information regarding emerging risks at the external borders'.²¹⁶

During the interviews conducted for the purposes of this study, the overall views on Frontex risk analyses were positive.²¹⁷ The respondents mentioned coherent and thorough analysis as a strength. However, there were a number of concerns raised. One of the issues is timing, as Frontex is obliged to prepare the risk analyses by August 31 of the next year, which means that the risk analysis for 2016 is prepared on the data gathered by August 2015. Such a long time lapse means that the information might not be relevant any more. Some respondents raised concerns on whether such analysis should be public, as it loses the depth and details. Some wanted to see more concrete indicators being used on what is actually happening at the borders, whereas others called for a greater focus on more predictive intelligence, rather than risk assessment.

5.2.1.2. Proposal for the European Border and Coast Guard: 'vulnerability assessment'

In the so-called 'Borders Package', presented on 15 December 2015, the Commission launched the proposal for the establishment of a European Border and Coast Guard (EBCG).²¹⁸ The establishment of the EBCG would mean that the current Frontex would obtain

²¹⁶ See Article 8a on rapid interventions and Article 11c on the processing of personal data of the European Communities (2007), Regulation (EC) No 863/2007.

²¹⁷ Interviews with German Permanent Representation, 27.05.2016; Slovenian Permanent Representation, 30.05.2016; Council secretariat, 19.05.2016.

²¹⁸ European Commission (2015), *Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC*, COM(2015) 671 final, Strasbourg, 15.12.2015.

extended powers.²¹⁹ Whereas Frontex currently only has a coordinating role, supporting Member States in controlling their external borders, the EBCG is due to gain more resources and executive powers. The final text on the EBCG was agreed between the EP and the Council in late June 2016.²²⁰ In operational terms, the new EBCG will have a rapid intervention pool of 1,500 officers. Various officers, ranging from police to border guards, would be deployed from a reserve of the EBCG, depending on the type of emergency. In addition, the EBCG would have its own technical pool for a more efficient response to manage a given situation. In addition, the EBCG proposal aims to improve the coordination of information exchange and operational cooperation between border authorities and other 'authorities with coast guard functions'. To this end, it is expected that EBCG will gain access to the SIS II database and will take a more active role on returns. As was discussed earlier in this study, this indicates the blurring lines between functions of border guards and policing (see Sub-Section 4.8.1.).

The EBCG text also strengthens the monitoring and supervisory competences of the new Agency in Article 7.1.b of the Regulation. The Commission proposes to strengthen the new Agency's role by adding a 'common vulnerability assessment methodology' in Article 12(1), which aims at identifying operational weaknesses and assess "the capacity and readiness" of EU Members States to control the common EU external borders. It is envisaged that the vulnerability assessment would be based on "objective criteria". Article 12(2) states that "the Agency shall monitor and assess at least once a year unless the Executive Director, based on risk assessments or a previous vulnerability assessment, decides otherwise, the availability of the technical equipment, systems, capabilities, resources, infrastructure, adequately skilled and trained staff of Member States necessary for border control. ." ²²¹ In Article 12 (3) it is stressed that particular attention will be paid to the capacity "to carry out all border management tasks including the capacity to deal with the potential arrival of large numbers of persons shall be taken into account."

The information necessary for carrying out this vulnerability assessment would be submitted by liaison officers posted in specific Member States, monitoring external border management in that state.²²² The results of the vulnerability assessment will be sent to the concerned Member State, which will have the chance to provide comments. Member States would be expected to take measures to address any deficiencies identified in that assessment, based on the recommendations issued by the Agency's Executive Director.²²³ The Executive Director shall base the recommendations on the risk analysis, the results of the assessment, the comments received by the Member States involved, as well as the results of the SEM. The

²¹⁹ Carrera, S. and den Hertog, L. (2016), "A European Border and Coast Guard: What's in a Name?", *CEPS Paper, Liberty and Security in Europe*, no. 88, 2016 March.

²²⁰ European Union (2016), Regulation (EU) 2016/... of the European Parliament and of the Council of ... on the European Border [and Coast] Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, and amending Regulation (EU) 2016/399 of the European Parliament and of the Council (not yet published in the OJ, agreed in LIBE committee on 27.06.2016).

²²¹ Article 12 of the European Union (2016), Regulation (EU) 2016/... of the European Parliament and of the Council of ... on the European Border [and Coast] Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, and amending Regulation (EU) 2016/399 of the European Parliament and of the Council (not yet published in the OJ, agreed in LIBE committee on 27.06.2016) provides more information as to 'what' is to be evaluated, which would include "present and future threats and pressures at the external borders, to identify, especially for those Member States facing specific and disproportionate pressures, possible immediate consequences at the external borders and subsequent consequences on the functioning of the Schengen area, and to assess their capacity to contribute to the rapid reaction pool referred to in Article 19(5)."

²²² Article 11 of the European Commission (2015), *Proposal for a Regulation [...] on the European Border and Coast Guard*, COM(2015) 671 final, Op.cit. See also the European Commission (2015), *Communication from the Commission to the European Parliament and the Council, A European Border and Coast Guard and effective management of Europe's external Borders*, COM(2015) 673 final, Strasbourg, 15.12.2015., p. 4.

²²³ Recital 13.

results of Vulnerability Assessments will be transmitted at least once a year to the European Parliament, the Council and the Commission. Recital 17 states that²²⁴:

"In cases where a Member State does not take the necessary measures in line with the vulnerability assessment or in the event of disproportionate pressure at the external borders where a Member State has not requested the Agency for sufficient support or is not taking the necessary actions for the implementation of these measures, rendering the control at the external border ineffective to an extent which risks putting in jeopardy the functioning of the Schengen area, a unified, rapid and effective response should be delivered at Union level. For the purpose of mitigating these risks, and to ensure better coordination at Union level, the Commission should identify and propose to the Council the measures to be implemented by the Agency and require the Member State concerned to cooperate with the Agency in the implementation of those measures. The implementing power to adopt such a decision *should be conferred on the Council* because of the potential politically-sensitive nature of the measures to be decided, often touching on national executive and enforcement powers. The European Border and Coast Guard Agency should then determine the actions to be taken for the practical execution of the measures indicated in the Council decision, *and an operational plan should be drawn up with the Member State concerned*. In case where a Member State does not comply within 30 days with this Council decision and does not cooperate with the Agency in the implementation of the measures contained in this decision, the Commission may trigger the application of the specific procedure where exceptional circumstances put the overall functioning of the area without internal border control at risk provided for in Article 29 of Regulation (EU) 2016/399."

Thus, the relationship between the EBCG vulnerability assessment and the SEM and the consequences of non-compliance are not yet clear in practice.²²⁵ According to the Commission, while the Schengen evaluation mechanism is meant to maintain mutual trust among the Member States, the vulnerability assessment would be more focused on prevention, so as to avoid "crisis situations".²²⁶ It is expected that the vulnerability assessment, in comparison with the SEM, would provide ongoing monitoring and would allow the new agency to respond more quickly. Nevertheless, the newly agreed text provides that 'vulnerability assessment' could trigger Article 29 SBC as a separate track. Indeed, while the Regulation states that this will be without prejudice to the SEM, the new procedure entails an amendment of Regulation (EU) 2016/399. The new article 78a (in conjunction with article 18) amends article 29 of the SBC (as follows)²²⁷:

" Article 78a

1. 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 as referred to in **Article 21 of this Regulation** or as a result of the **non-compliance of a Member State with** a Council decision referred to in **Article 18(1)** of

²²⁴ European Union (2016), Regulation (EU) 2016/... of the European Parliament and of the Council of ... on the European Border [and Coast] Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, and amending Regulation (EU) 2016/399 of the European Parliament and of the Council (not yet published in the OJ, agreed in LIBE committee on 27.06.2016).

²²⁵ Rijpma, J. (2016) "The proposal for a European Border and Coast Guard: evolution or revolution in external border management?" Directorate-General for Internal Policies, European Parliament, March 2016, p. 14-17. URL: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL_STU\(2016\)556934_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL_STU(2016)556934_EN.pdf).

²²⁶ European Commission (2015), *Proposal for a Regulation [...] on the European Border and Coast Guard*, COM(2015) 671 final, Op.cit., p. 4.

²²⁷ European Union (2016), Regulation (EU) 2016/... of the European Parliament and of the Council of ... on the European Border [and Coast] Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, and amending Regulation (EU) 2016/399 of the European Parliament and of the Council (not yet published in the OJ, agreed in LIBE committee on 27.06.2016).

Regulation (EU) 2016/... of the European Parliament and of the Council*, 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 in accordance with paragraph 2 of this Article for a period of up to six months**. That period may **be prolonged, no more than three times**, for a further period of up **to six months** if the exceptional circumstances persist.”

Thus, the amendment provides that any EU Member State could claim the existence of ‘exceptional circumstances’ justifying the reintroduction of temporary internal border controls, should the MS at external borders not cooperate with the proposed EBCG intervention under Article 18²²⁸:

“ Article 18

Situation at the external borders requiring urgent action

1. Where a Member State **does not take the necessary measures** in accordance with a decision of the **Management Board** referred to in **Article 12(6)** or in the event of **specific and disproportionate pressure at the external border**, where a Member State has not requested the Agency for sufficient support by means of actions as mentioned in Articles 14, 16 or 17 or is not taking the necessary actions for the implementation of those measures, thus **rendering the control of the external borders ineffective** to such an extent that it risks putting in jeopardy the functioning of the Schengen area, the Council, on the basis of a proposal from the Commission, may adopt without delay a decision by means of an implementing act, identifying the **measures that should mitigate those risks** to be implemented **by the Agency** and requiring the Member State concerned to **cooperate with the Agency** in the implementation of those measures. The Commission shall consult the Agency before making its proposal.

1a. If a situation requiring urgent action arises, the **European Parliament** shall be informed of that situation **without delay** and shall **be informed of all subsequent measures and decisions taken in response.**”

A regular monitoring of compliance with EU standards by EU Member States holding the common EU external border is a welcome step forward in this initiative. It is, however, unclear how the vulnerability assessment procedure will address the challenges identified in this study with regard to the SEM in light of the recent experience in Greece and the use of Article 29 SBC. Envisaging a formal role in the assessment for the EBCG in triggering Article 29 SBC will mean that the process is no longer exclusively in the hands of the European Commission. It is not to be forgotten that, according to Article 62 of the proposal, the Management Board of the new Agency will be composed of “one representative of each Member State and two representatives of the Commission, all with voting rights.” This can be expected to grant EU Member States a high degree of influence over the decisions taken by the Executive Director. However, the European Commission will still remain in the main driving seat in the running of the SEM and in activating Article 29 SBC. That notwithstanding, the involvement of the EBCG will certainly lead to a higher degree of ‘politicisation’ surrounding the operability of the Article 29 SBC procedure. Moreover, unlike the SEM, the EBCG vulnerability assessment will not cover the monitoring of internal border checks. It is, therefore, necessary to better operationalise, and ensure the effectiveness of, the SEM irrespective of the new vulnerability assessment.

²²⁸ European Union (2016), Regulation (EU) 2016/... of the European Parliament and of the Council of ... on the European Border [and Coast] Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC, and amending Regulation (EU) 2016/399 of the European Parliament and of the Council (not yet published in the OJ, agreed in LIBE committee on 27.06.2016).

In addition, a question can be raised as regards the kind of checks and balances that will be in place to scrutinise the 'objectivity', impartiality and evidence-based nature of the assessment to be conducted by the new EBCG. So far, Article 1a provides that the EP should remain informed. As previously identified in this study, there are, however, fundamental obstacles and practical barriers in the current procedures, which prevent effective and meaningful access to documents and transparency by the European Parliament. Article 70.5 states that "the Consultative Forum shall have effective access to all information concerning the respect for fundamental rights, including by carrying out on spot visits to joint operations, or rapid border interventions subject to the agreement of the host Member State, hotspot areas, return operations and return interventions." It is therefore essential that this Article be fully implemented and that the Consultative Forum annual reports include fundamental rights considerations/challenges in Member States' implementation practices in the context of Article 18 of the Regulation. Furthermore, the objectivity of the vulnerability assessment would be further ensured if the European Parliament called upon the new Fundamental Rights Officer to report back key issues in relation to the annual vulnerability assessment drawn up by the Agency. This would be in line with the new Article 71.2, which states that: "The Fundamental Rights Officer shall report on a regular basis and as such contribute to the mechanism for monitoring fundamental rights."

5.2.2. The European Asylum Support Office: evaluation of the CEAS and needs of Member States 'subject to particular pressure'

For the moment EASO does not play an observer role in the SEM on-site missions. Since, anecdotally, one of the main issues that MS faced during the refugee crisis was a lack of capacity and preparedness to receive asylum seekers, to register them in the EURODAC and to assess their asylum claims in a timely fashion and in line with CEAS and EUFRC, the absence of EASO seems strange. According to Article 10(5) of Regulation 1053/2013, the Commission may invite Frontex, Europol or other Union bodies, offices or agencies involved in the implementation of the Schengen *acquis* to designate a representative to take part as an observer in an on-site visit concerning an area covered by their mandate. This provides a basis for an EASO observer in on-site visits in addition to the information that EASO may provide during the preparation of questionnaires and on-site visits.

Nevertheless, EASO draws up its own reports on the functioning of the CEAS. According to Article 12 of the EASO Regulation 439/2010, EASO shall draw up an annual report on the situation of asylum in the Union, on the basis of information 'already available from other relevant sources'. As part of that report, the EASO shall evaluate the results of activities carried out under this Regulation and make a comprehensive comparative analysis of them with the aim of improving the quality, consistency and effectiveness of the CEAS.²²⁹ Furthermore, to be able to assess the needs of Member States 'subject to particular pressure', Article 9 of the EASO Regulation states that this Agency will gather, on the basis of information provided by Member States, the UNHCR and, where appropriate, other relevant organisations, relevant information for the identification, preparation and formulation of emergency measures referred to in Article 10 to cope with such pressure.

The task of EASO to gather information includes the systematic identification, collection and analysis of 'information relating to the structures and staff available, especially for translation and interpretation, information on countries of origin and on assistance in the handling and management of asylum cases and the asylum capacity in those Member States subject to

²²⁹ European Union (2010), Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132, Brussels, 29.5.2010.

particular pressure, with a view to fostering quick and reliable mutual information to the various Member States' asylum authorities' (Article 9(2)).

5.2.3. Fundamental Rights Agency: ensuring fundamental rights compliance

Fundamental rights are an integral part of the Schengen *aquis*. Thus, FRA plays an important role in supporting Schengen evaluators with fundamental rights expertise. FRA's work has focused mainly on the following areas of the Schengen *aquis*: border management, return, visa policy, police cooperation and SIS II.

It should also be noted that Recital 14 of the SBC stresses the importance of fundamental rights, stating that fundamental rights violations shall give rise to the intervention of the European Parliament (see Sub-section 3.2.).

FRA is involved in Schengen evaluation at three levels:

- Providing risk analysis;
- Training evaluators;
- Participation in the on-site mission;

5.2.3.1. FRA risk analysis

Under Article 8 of the SEM, the Commission may request relevant EU agencies to submit a risk analysis. Pursuant to this provision, the Commission requests yearly a risk analysis to FRA. FRA has to present its analysis to the Standing Committee on the evaluation and implementation of Schengen (Schengen evaluation committee). After the evaluation cycle is finished, the Commission makes such a report public. For example, in 2014, the FRA published its risk analysis.²³⁰ In its analysis, FRA provides an overview of the relevant fundamental rights issues in the EU Member States subject to regular evaluations. Due to mandate limitations, FRA does not cover Schengen Associated Countries in its analysis. The focus of the analysis is border management and return/re-admission, although other policy areas can also be covered. The risk analysis is based on:

- Information and data gathered from the FRA research;
- Publicly available official information from the UN, Council of Europe, national human rights institutions (e.g. ombudspersons), national authorities and civil society organisations (press reports are only exceptionally used, primarily for very recent events not yet covered elsewhere).

The FRA risk analysis complements fundamental rights-related questions in the standard Schengen evaluation questionnaire.²³¹ FRA follows its own institutional guidelines that cover methodological and procedural steps to prepare the risk analysis. The FRA methodology ensures that information provided is solid and cross-checked.

²³⁰ European Union Agency for Fundamental Rights (2014), 2014 Schengen evaluations: Risk analysis submitted by FRA under Article 8 of Regulation (EU) No. 1053/2013, Annex to MIGRAPOL CC Return Dir 54, Vienna, 09.08.2014. URL : <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=16015&no=4>.

²³¹ European Commission (2014), ANNEX 1 to the Commission Implementing Decision establishing a standard questionnaire in accordance with Article 9 of the Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, C(2014) 4657 final, Brussels, 11.7.2014. (further – SEM Questionnaire). URL: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/general/docs/c_2014_4657_f1_annex_en.pdf

5.2.3.2. Training of future evaluators

FRA is involved in the training of future evaluators, who will participate to announced or unannounced on-site missions. Training of Schengen evaluators is organised by Frontex (covering border management and return) or by CEPOL (covering police cooperation, SIS and visa policies). FRA contributes to such training sessions.

Evaluators usually come from national governments or agencies. The training covers those fundamental rights issues that could be at stake when evaluating a particular area of the Schengen *acquis*. There is no mechanism ensuring that the people who have received the training are actually deployed²³², though the FRA respondent confirmed that many of them do indeed get deployed.²³³

5.2.3.3. Participation in the on-site missions

On the basis of Article 10(5) of the SEM, FRA is invited by the Commission to participate in the on-site missions as an observer. The agency is invited to the evaluation missions in the fields of return and readmission, but not on borders issues. FRA representatives cover relevant questions on returns and readmissions, safeguards concerning protection from unlawful or arbitrary detention, forced return monitorin, etc. During the mission, FRA officials act as advisors/experts on fundamental rights-related issues. The missions are led by DG HOME in the Commission, which distributes the relevant information among the experts.

5.2.3.4. Questionnaires

The Schengen evaluation mainly relies on the information produced by the MS, as is enshrined in SEM (Regulation 1053/2013). MS complete a questionnaire with a set of fundamental rights-related questions, such as on the return *aquis*, detention conditions, detention of children, external borders, the respect of *non-refoulement* principle, and access to international protection. The questionnaire also includes the issue of how freedom of movement is respected when exercising border controls. Only questions 34 and 35 of the questionnaire²³⁴ relate to internal controls – i.e. whether or not police checks are tantamount to border checks. The questionnaires are not used for the FRA risk analysis, as they come in later than the FRA assessment.

²³² Interview with the Commission, DG Home, 17.05.2016.

²³³ Interview with the FRA, 04.05.2016.

²³⁴ European Commission (2014), SEM Questionnaire, Op.cit.

6. CONCLUSIONS AND RECOMMENDATIONS

This study has examined the Schengen governance system in the wake of the recent events of 2015 and early 2016, often referred to as the European refugee crisis. The analysis concludes that no legislative reform is necessary in light of these developments. While the Commission has referred to the need to get 'back to Schengen' before the end of 2016, the developments since the summer of 2015 show that we have never left it. The Schengen governance system adopted in 2013 is 'fit for purpose' and Schengen is here to stay. The few EU Member States that have reintroduced internal border checks have done so (at least formally) in compliance with the Schengen rules. Notwithstanding that, as this study shows, the grounds or justifications given by these States to continue with the reintroduction of internal border controls are not sufficient. The controls are disproportionate and beyond what is necessary in light of the predominantly asylum-based nature of the European refugee crisis and the lack of solidarity shown.

The latest developments do not therefore justify any new legislative reform of the Schengen system and its governance framework. The Schengen system was reformed in 2013 and the new system has been only implemented in practice since 2015. It would therefore be premature to bring in a new legislative reform package. It is, however, imperative that each EU institutional actor play its role more effectively in the evaluation of EU Member States' compliance with the Schengen Borders Code (SBC) and the lawfulness of internal border checks. The European Commission cannot be a mediator among EU Member States - this is a role for the Council to play. The Commission must rather act as guarantor of the Treaties, and thoroughly and objectively evaluate Member States' compliance with Schengen principles and rules. The European Parliament needs to be better equipped to ensure that the Commission is duly carrying out its role in evaluating Member States' compliance with the rules, and to perform a greater democratic scrutiny over EU Member States' compliance, in particular when their actions affect the fundamental rights of individuals.

The analysis shows that the Member States' justifications for the reintroduction of intra-Schengen state borders controls under Articles 26–29 since 13 September 2015 have been woefully inadequate. They lack substantiation and detail and fail to substantively fulfil the requirements of the SBC. Justifications made by Member States for the reintroduction of intra-Schengen Border controls should be fully and properly communicated to the public and explained on the basis of the criteria set out in the SBC; rote repetition of the wording of the Articles in the SBC should not be considered sufficient. The proportionality assessment for the reintroduction of intra-Schengen border controls that any Member State seeking to use these provisions must undertake needs to be thorough and complete in light of the fundamental nature of the right to the intra-Schengen free movement of persons without border checks as a part of the internal market.

Moreover, continuing internal border checks on the basis of fears of future/potential secondary movements of asylum seekers, or the instability of the EU-Turkey Statement, cannot be accepted. This justification is not based on independent and thorough evidence and is therefore disproportionate and could jeopardise the sustainability of the entire Schengen machinery. The fact that the European Commission is now in the driving seat of Schengen evaluations constitutes a positive step forward in comparison to the previous inter-governmental (peer-to-peer) evaluation system. Still, recent developments have showed the need for the Commission to act more firmly in enforcing EU standards and to be better equipped. It must ensure that Member States' actions are evidence- and needs- based, and are not just driven by irrational, fear-based national political games. The intersection of the

arrival of refugees in larger numbers than anticipated and the perception of unreasonable pressure on the intra-Schengen borders has been evident. The most substantial issue is the reaction to refugee arrivals, not via the Common European Asylum System (CEAS), but by the reintroduction of internal borders. These may be used to regulate the movement of third country nationals, but should not be applied to refugees.

Where Member States invoke 'secondary movements' of asylum seekers within the Schengen area as a reason for the reintroduction of intra-Schengen border controls, very serious and compelling reasons should be provided with supporting documentation that shows the genuine existence of a threat. The free movement of persons without impediment by border controls is one of the main objectives of the internal market and a core benefit of it. Moreover, re-instating border checks can do little to ensure the requisite reception conditions for asylum seekers and refugees. Where Member States invoke the threat of terrorism as a reason for the reintroduction of intra-Schengen border controls, sufficient detail as to the nature of the threat, and how precisely internal border controls would address it, must be provided to the EU institutions so that they can ensure that the proportionality assessment is correctly carried out.

All the EU Member States that continue to apply internal border checks have failed to pass the necessity and proportionality test required by the EU Schengen governance framework. The Commission proposal and subsequent Council Decision of 12 May, setting out a Recommendation for temporary internal border controls in exceptional circumstances that put the overall functioning of the Schengen area at risk, was based on evaluations conducted back in November 2015. These focused solely on Greece's capacity to deliver on SBC standards. However, the situation both in Greece and the five EU Member States that have been allowed to continue with border controls has profoundly changed during the last six months and the Schengen evaluation procedure does not always ensure an up-to-date account of the situation on the ground. Moreover, those Schengen evaluations did not focus on compliance and delivery of CEAS asylum standards by Greece, nor by the other EU Member States re-instating internal border checks. It is regrettable that the Commission has accepted the non-evidence-based justifications from the five Member States and has focused its assessment purely on border control standards in Greece. However, the Study shows that the Council Decision of 12 May 2016 set very specific conditions, geographical locations and a specific timeframe (as well as obligations to report back to the Commission) for these five Member States conducting internal border checks. The Council Decision also clearly shows that this is a rather small group of concerned states, who are clearly a minority in the wider EU Schengen membership picture.

People moving across Schengen borders in search of international protection must not be classified as 'irregular migrants'. People in need of international protection should never be referred to as 'illegal'. The Member States and the EU institutions must recognise that they are asylum seekers and refugees in accordance with the United Nations High Commissioner for Refugees (UNHCR) definition of a refugee and effectively apply EU asylum law and the EU Charter of Fundamental Rights. The EU institutions and Member States must respect their duty under the 1951 UN Refugee Convention (Article 31) not to commence criminal prosecutions or apply other penalties to refugees for their irregular entry onto their territory, including entry as a result of intra-Schengen movement. The classification of asylum seekers as irregular immigrants to justify borders controls or police checks in border areas is problematic for three reasons. First, it allows the extended use of internal border checks, contrary to the purposes of the SBC. Second, based on this classification, asylum seekers crossing internal borders can be detained on the basis of regular migration rules, disregarding applicable EU laws on the reception of asylum seekers. And third, it displaces the focus of

attention from a challenge that is predominantly one of asylum, to one of border containment and control as 'the solution'.

According to Article 23 of the SBC, the exercise of police powers and checks at the internal borders may not have the objective (or be equivalent to) border controls and must be based on general police information and experience 'regarding possible threats to public security and aim, in particular, to combat cross-border crime'. Furthermore, they must be devised and executed in a manner clearly distinct from systematic checks on persons at the external borders (and rather be carried out on the basis of 'spot checks'). Several Member States use police checks in border areas for migration control purposes, making a direct connection between irregular immigration and possible threats to public security. These police practices fall within the scope of the SBC and are therefore subject to European scrutiny. They are contrary to the purpose of Article 23 and recital 26 of the SBC stating that "migration and the crossing of external borders by a large number of third-country nationals should not, per se, be considered to be a threat to public policy or internal security". National practices of mobile police checks at the internal borders illustrate that the line between 'border controls' and 'border checks', prohibited in 22 SBC on the one hand, and police checks allowed in Article 23 SBC, remains unclear. While the 2013 Schengen governance reform allowed the European Commission to conduct on-site evaluations of internal police checks practices, the effectiveness of this scrutiny is largely undermined by a high degree of legal uncertainty and the lack of transparency of Member State law enforcement authorities' actions when checking people on the move. On the basis of the above, we put forward the following recommendations:

Recommendations

First, the 2013 Schengen Governance Package is fit for purpose and recent developments do not justify new legislative amendments or reforms to the Schengen Borders Code. The new rules have only recently been put into effect and there should be at least a five-year settling-in period before more amendments are considered. Instead, the Commission should take a much more robust and evidence-based approach to the legal assessment of Member States' notifications for the reintroduction of intra-Schengen border controls and subject them to a comprehensive proportionality test. The test should centre on the impact of the abolition of intra-Schengen state border controls on the movement of persons and the internal market.

Second, the Commission should prepare, in consultation with the UNHCR, guidelines for the Member States on the correct application of Article 31 of the Refugee Convention in the EU area without internal border controls. Where there is evidence that Member States are starting criminal proceedings against refugees for irregular entry onto their territory, either from outside the Schengen area or within it, it should commence infringement proceedings for failure to correctly apply the CEAS. The EU should equip itself with an 'asylum evaluation mechanism' similar to the one in Schengen based on Article 70 of the TFEU.

Third, the results of Schengen evaluations of external and internal borders should meet a higher degree of public scrutiny and transparency. There should be a clear obligation to communicate publicly about developments such as those of the last 10 months, including the kind of measures adopted by some EU Member States and the exact scope of internal border checks and their justifications. The European Parliament's role should be better implemented and fine-tuned.

The European Parliament should be better equipped to require the Commission to fulfil its obligations under the Treaties and be a real guardian of the treaties, not a facilitator of the whims of the Member States. Specific procedures should be developed as regards the ways in which the Commission classifies and sends information resulting from these evaluations to the European Parliament.

The European Parliament and national parliaments should be more accurately informed on of the state of play with respect to infringement procedures initiated by the Commission against Member States based on alleged violations of the SBC. This information should include the content of the letter of formal notice and reasoned opinion of the Commission and the subsequent answers of the Member States.

Fourth, Member States that extend the use of police checks at the internal borders within the meaning of Article 23 SBC (former Article 21) should be obliged to inform the Commission and other Member States more thoroughly. Article 23 SBC (former Article 21) must be amended accordingly. The Commission should prepare guidelines on the use of police checks in border areas that can be allowed within the scope of Article 23(a) SBC (former 21(a)). There are currently no effective ways to assess and monitor checks by national police authorities that basically amount to border controls. Any future revision of the SIS II should include an obligation for national police and other law enforcement authorities to report the reason, scope and location of checks when using the SIS II. The over-use of SIS II by national authorities could be an indicator that domestic practices are jeopardising the SBC and the spirit of Schengen.

Fifth, the current practical application of the Article 29 mechanism could be improved. Its current operability undermines the EU principles of solidarity between Member States and adherence to the Schengen *acquis*, by only punishing Member States who are unable or unwilling to cope with large numbers of asylum seekers and allowing others to close their internal borders without due foundation. It should instead ensure that the latter assist the border Member States in dealing with and receiving asylum seekers and migrants. The relationship between the risk analysis of Frontex, the proposed 'vulnerability assessment' of the European Border and Coast Guard, and the existing Schengen evaluation mechanism (as well as the consequences of non-compliance) should be clarified in the applicable EU law. Frontex (or the future European Border and Coast Guard) should not be able to trigger or justify the use of Article 29 SBC on its own.

Sixth, a key weakness in the current Schengen evaluation and monitoring mechanism, and the evaluations performed by the Commission, is that they lack on-the-ground and objective knowledge of the actual challenges faced in the practical delivery of EU Schengen and asylum standards by relevant EU Member States. The role of civil society organisations should be explored and better utilised so as to ensure a more independent and substantiated assessment of Member States' actions on the ground. The European Parliament should support the setting up of a 'Shadow Evaluation Mechanism', focused on Member States' compliance with Schengen and CEAS rules. This should be further elaborated on by civil society organisations, in close cooperation with the European Union Agency for Fundamental Rights (FRA). This mechanism would ensure an independent and on-the-ground assessment of the effective implementation of Schengen and asylum rules at domestic levels.

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ANNEX 1. SUMMARIES OF CJEU CASE LAW ON THE SCHENGEN BORDERS CODE

Up to May 2016 nine cases with respect to the rules on borders in the Schengen Borders Code (SBC) have reached the Court of Justice of the EU. The Court has handed down six judgments, four concerning rules on external borders and two with respect to rules on internal borders. Two more cases are pending before the Court: one on grounds for refusal at the external borders and one on police controls behind internal borders. One reference on controls behind internal borders was withdrawn after the judgment of the Court in a similar case. We will first discuss the judgments with respect to rules on external border and then those on internal borders. Finally, two other judgments of the Court with general observations on the Schengen Borders Code are mentioned in points 10 and 11 below.

All judgments relate to the 2006 version of the Code. For the sake of clarity and uniformity, we use hereunder the new numbers of the corresponding Articles in the re-codified version of the SBC (Regulation 2016/399).

So far no cases with respect to Regulation 1053/2013 have reached the Court.

CJEU case law on external borders

1. In its first judgment on the Schengen Borders Code in *Carcia & Cabrera*, the Court, in reply to a question referred by a Spanish court in two cases, held that *Article 12 SBC does not imply that a Member State is obliged to expel a third-country national unlawfully present on its territory because he or she does not fulfil, or no longer fulfils, the conditions of duration of stay applicable there*. Moreover, the Court held that *Article 6 SBC* establishing the entry conditions for third-country nationals when they cross an external border for stays not exceeding three months per six-month period, *and Article 14 SBC* concerning the refusal of entry to the territory of the Member States, *both do not apply to third-country nationals who were unlawfully on the territory of the Member State and did not fulfil the conditions for entry, when the expulsion order was made against them* (CJEU 22 October 2009 C-261/08 *Garcia & Cabrera*, ECLI:C:2009:468, points 44, 45 and 66).

2. The reference by the French Conseil d'Etat raised the question of whether a circular from the Minister of Interior *introducing mandatory refusal of re-entry without a visa into French territory to third-country nationals holding acknowledgements of receipt of an asylum application was compatible with the Schengen Borders Code*. Before that circular these third-country nationals could leave France and return via the Schengen area external borders provided that that document had not expired. The circular put an end to that administrative practice without providing for a transitional period.

The Court held that the rules governing refusal of entry laid down in Article 14 SBC apply to any third-country national who wishes to enter a Member State by crossing an external border of the Schengen area. *These rules are also applicable to third-country nationals who are subject to the requirement to obtain a visa and wish to return via the Schengen area external borders to the Member State which issued them with a temporary residence permit pending examination of an application for asylum*. That permit does not entitle the third-country national to enter for that purpose the territory of another Member State. Further, the Court decided that *the principles of legal certainty and protection of legitimate expectations did not require the provision of transitional measures in the SBC* for the benefit of third-country nationals who had left the territory of a Member State when they were

holders of this type of temporary residence permit and wanted to return to that territory after the entry into force of the SBC. Finally, it was held that *a Member State which issues to a third-country national a re-entry visa within the meaning of that provision cannot restrict entry into the Schengen area solely to points of entry to its national territory* (CJEU 12 June 2012 C-606/10 *ANAFE*, ECLI:C:2012:348).

3. Another judgment was given in the case of Mr Zakaria who had permanent residence rights in Sweden and flew from Beirut to Copenhagen via Riga, using as an identification document his Palestinian refugee travel document issued by Lebanon. At Riga airport, the border guards inspected his documents and finally allowed him to enter Latvia and thus the Schengen area. *Mr Zakaria considered that his documents were inspected in an offensive and provocative manner, which violated his human dignity.* On account of the time taken by that inspection he missed his flight to Copenhagen. He lodged a complaint with the Head of the State border control and sought compensation before Latvian courts. In answer to questions from the Latvian Supreme Court, the Court of Justice held that Article 14(3) SBC obliges Member States to establish a means of obtaining redress only against decisions to refuse entry. But the national court should establish whether the treatment of Mr Zakaria at Riga airport was in conformity with Article 7 SBC, requiring border guards in the performance of their duties to fully respect human dignity and not to discriminate against persons. *Member States should in their national law provide for the appropriate legal remedies to ensure, in compliance with Article 47 EU Charter, the protection of persons claiming the rights derived from Article 7 SBC* (CJEU 17 January 2013 C-23/12 *Zakaria*, points 35 and 40).

4. Air Baltic in 2010 transported, on a flight from Moscow to Riga, an Indian citizen who, at border control at Riga airport, produced *a valid Indian passport without a uniform Schengen visa and a cancelled Indian passport, to which a valid multiple entry uniform visa was affixed, issued by Italy.* The cancelled passport contained the annotation: 'Passport cancelled. Valid visas in the passport are not cancelled.' The Indian citizen was refused entry into Latvian territory on the ground that he did not have a visa in a valid passport. The Latvian immigration authorities imposed an administrative fine on Air Baltic, on the grounds that Air Baltic had transported to Latvia a person without the required travel documents. Both the complaint made by Air Baltic with the administrative authorities and its action against the fine in the administrative court were dismissed. In reply to a the referral by the Riga Administrative Court, the Court of Justice held that Article 6(1) and Article 14(1) Schengen Borders Code, read together, provide that the entry of third-country nationals into the territory of Member States is not subject to the condition that, at the border check, the valid visa presented must necessarily be affixed to a valid travel document. The Court, more generally, held that *a Member State does not have discretion to refuse a third-country national entry to its territory by applying a condition that is not laid down in the Schengen Borders Code* (CJEU 4 September 2014 C-575/12 *Air Baltic*, ECLI:C:2013:2155, points 69 and 70).

5. In an action brought by the Parliament, the Court, in 2012, *annulled Council Decision 2010/252 supplementing the Schengen Borders Code* as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by Frontex because the Decision contained essential elements of the surveillance of the sea external borders of the Member States which go beyond the scope of the additional measures within the meaning of Article 12(5) of the 2006 SBC, and only the Parliament and the Council, acting together, were entitled to adopt such a decision (CJEU 5 September 2012 C-355/10 *Parliament v Council*, ECLI:C:2012:519).

6. Pending before the Court is the question of whether Article 3(1) of Regulation 1889/2005 **on controls of cash entering or leaving the Community** and Article 5(1) SBC must be interpreted as meaning that a national of a third State who is in the international transit area of an airport is not subject *to the obligation to make a declaration about carrying cash of a value of EUR 10 000 or more* under Article 3(1) of Regulation 1889/2005, or, on the contrary, whether those provisions must be interpreted as meaning that that national is subject to that obligation by virtue of having crossed an external border of the Community at one of the border crossing points referred to in Article 5(1) Schengen Borders Code. (Case *El Dakkak* C-17/16)

CJEU case law on internal borders

All three cases relate to the limits of the powers of national authorities to conduct police controls in a zone directly behind the internal land borders with other Schengen states.

7. **In the Melki case** the French Cour de Cassation asked whether Article 67 TFEU precludes national legislation which permits police authorities, within an area of 20 kilometres from the internal land border with another Schengen state, to check the identity of any person in order to ascertain whether he fulfils the obligations laid down by law to hold, carry and produce papers and documents. The Court of Justice held that Article 67(2) TFEU and Articles 22 and 23 SBC precludes national legislation which grants national police authorities the power to check, solely within an area of 20 kilometres from the land border with another Schengen state, the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled, where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks. (CJEU 22 June 2010 C-188/10 *Melki & Abdeli*, ECLI:C:2101:363).

8. **Mr Adil**, an Afghan national was stopped by the Dutch border police when he was a passenger in a bus driving on a motorway within an area 20 kilometres from the land border with Germany. After he was stopped, Mr. Adil applied for asylum. He was put in immigration detention on the grounds of unlawful residence in Netherlands. Before the District Court and the Council of State, Mr Adil contested the lawfulness of the stop and the decision to detain him, on the grounds that the check amounted to a border check prohibited by the Schengen Borders Code. The Council of State referred the question on the limits of Member States' power to conduct controls in the zone behind the internal land border to the Court of Justice. In the *Adil* judgment in 2012 the Court, as in the *Melki* judgment, observed that the checks were not carried out at the internal border as such. Hence, the checks were not prohibited by Article 22 SBC. Since they were carried out in the territory, the checks fell within the scope of Article 23 SBC. The Court held that Articles 22 and 23 SBC do not preclude national legislation which enables officials responsible for border surveillance and the monitoring of foreign nationals to carry out checks, in a geographical area 20 kilometres from the internal land border between two Schengen States with a view to establishing whether the persons stopped satisfy the requirements for lawful residence applicable in the Member State concerned provided that three conditions are met: (1) those checks are based on general information and experience regarding the illegal residence of persons at the places where the checks are to be made, (2) they may also be carried out to a limited extent in order to obtain such general information and experience-based data in that regard, and (3) the carrying out of those checks is subject to certain limitations concerning, inter alia, their intensity and frequency. (CJEU 19 July 2012 C-278/12 *Adil*, ECLI:C:2012:508).

From these two judgments it appears that police checks applied uniformly throughout the territory will rarely be forbidden by Article 23 SBC. Specific rules on police checks in the border zone are permitted but should be accompanied by detailed safeguards to ensure that the checks are selective and targeted. In the Court's words: "the more extensive the evidence of the existence of a possible equivalent effect, within the meaning of [Article 23 Schengen Border Code] apparent from the objective pursued by the checks carried out in a border area, from the territorial scope of those checks and from the existence of a distinction between the basis of those checks and that of those carried out in the remainder of the territory of the Member State concerned, the greater the need for strict detailed rules and limitations laying down the conditions for the exercise by the Member States of their police powers in a border area and for strict application of those detailed rules and limitations, in order not to imperil the attainment of the objective of the abolition of internal border controls" (*Adil* point 75).

The earlier referral of a similar question to the Court by a Dutch District Court was withdrawn shortly after the Court's judgment in *Adil* (see case C-88/12 (*Jaoo*)).

9. **The Amtsgericht Kehl (Germany)**, in a criminal case, referred two questions on *police controls behind the internal land borders* of the Schengen area to the Court in January 2016. Firstly, it asked whether Article 67(2) TFEU and Articles 22 and 23 SBC or any other rules of EU law preclude national legislation which grants the police authorities the power to check, within an area of up to 30 km from the internal (Schengen) land border, the identity of any person, irrespective of his behaviour and of specific circumstances, with a view to impeding or stopping unlawful entry into the territory of that Member State or to preventing certain criminal acts directed against the security or protection of the border or committed in connection with the crossing of the border, in the absence of any temporary reintroduction of border controls at the relevant internal border.

Secondly, it asked whether Article 67(2) TFEU and Articles 22 and 23 SBC or any other rules of EU law preclude a rule of national law which grants the police authorities the power briefly to stop and question any person on a train or on the premises of the railways of that Member State, with a view to impeding or stopping unlawful entry into the territory of that Member State, and to request that person to produce for the purposes of checking the identity documents or border crossing papers he is carrying and visually inspect the articles he is carrying, if, on the basis of known facts or border police experience, it may be presumed that such trains or railway premises are used for unlawful entry and that entry is effected from a Schengen State in the absence of any temporary reintroduction of border controls at the relevant internal border. (Case A, C-9/16).

10. In the ***Shomodi*** judgment, the Court of Justice held that the spirit of Regulation No 1931/2006 on local border traffic demands that its provisions be given an autonomous interpretation where the need arises. Both the objectives of that regulation and its provisions indicate that the EU legislature intended to put rules in place for local border traffic which derogate from the Schengen Borders Code. (CJEU 21 March 2013, C-254/11 *Shomodi*, ECLI:C:2013:182, point 24).

11. The Court held in ***Gaydarov*** that it cannot be either the purpose or the effect of the Schengen Borders Code, as is clear from recital 5 and Article 3(a) thereof, to restrict the freedom of movement of Union citizens as provided for by the TFEU. (CJEU 17 November 2011, C-430/10 *Gaydarov*, ECLI:C:2011:749, point 28).

ANNEX 2. EU LARGE-SCALE INFORMATION SYSTEMS: WHO HAS ACCESS TO WHAT?

To date, Europol and Eurojust are the only EU security agencies that are authorised to connect to the three EU databases of the Area of Freedom, Security and Justice whose structure is primarily based on a central system: the Schengen Information System second generation (SIS II), the Visa Information Schengen (VIS) and EURODAC. However, officials of the Commission and JHA Counsellors of the Council are pondering the possibility of granting access to SIS II to the future European Coast and Border Guard. Below we first lay out the access rights of Europol and Eurojust as EU law currently defines them. We then move on to locating the positions of both agencies in the wider security landscape, as they are defined by these access rights.

Access to SIS II

According to Article 41 of Decision 2007/533/JHA on the establishment, operation and use of the second generation Schengen Information System (SIS II)²³⁵, Europol can access and search directly alerts on persons wanted for arrest or extradition,²³⁶ alerts on persons and objects wanted for discreet surveillance,²³⁷ and alerts on objects wanted for seizure in criminal proceedings.²³⁸

If a search retrieves a hit, Europol informs the requesting Member State via a secure information exchange network application and Europol National Units. Europol may also request further information through the same channels.

Europol is prohibited from recording or copying any parts of SIS II in any computer system such as the Analytical Work Files and the Europol Information System. Only specifically authorised Europol staff can handle SIS II requests. The Europol Joint Supervisory Body supervises the rights and practice of access to SIS II data.

According to Article 42 of the SIS II Decision 2007/533/JHA, Eurojust can access and search directly alerts on persons wanted for arrest or extradition,²³⁹ alerts on missing persons,²⁴⁰ alerts to persons sought for participation in criminal procedures,²⁴¹ alerts on objects wanted for seizure in criminal proceedings.²⁴²

In case of a hit, the members of Eurojust inform the issuing member states. No parts of SIS II can be copied onto Eurojust Computer System. According to Article 43 of SIS II Decision 2007/533/JHA Europol and Eurojust Staff may only access data that are necessary for the performance of their tasks.

Finally, discussions are currently being held within the Commission regarding the possibility to grant the European Border and Coast Guard access to SIS II in order to improve and increase the operational involvement of this agency in return operations.

²³⁵ Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) OJ L 205, 7.8.2007, p. 63–84 (<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32007D0533>).

²³⁶ Council Decision 2007/533/JHA, Article 26.

²³⁷ *Ibid.*, Article 36.

²³⁸ *Ibid.*, Article 38.

²³⁹ *Ibid.*, Article 26.

²⁴⁰ *Ibid.*, Article 32.

²⁴¹ *Ibid.*, Article 34.

²⁴² *Ibid.*, Article 38.

Access to EURODAC

According to Article 1.2 of EURODAC Regulation (EU) No 603/2013,²⁴³ Europol can access the database for law enforcement purposes. Article 7 of EURODAC Regulation (EU) No 603/2013 makes provision for the creation of a verifying authority, operating independently from the operating unit of Europol, which is authorised to request comparisons with EURODAC data. This unit is competent to “collect, store, process, analyse and exchange information to support and strengthen action by Member States in preventing, detecting or investigating terrorist offences or other serious criminal offences falling within Europol's mandate.”

According to Article 21 of EURODAC Regulation (EU) No 603/2013, the Europol operating unit can electronically request comparison with fingerprint data in cases where there is an overriding public security concern, where the comparison is necessary and case-specific and where there are serious grounds to suspect that a person who is registered on EURODAC might be involved in a serious crime or terrorism-related offence. Eurojust is not granted access to EURODAC.

Access to the Visa Information System

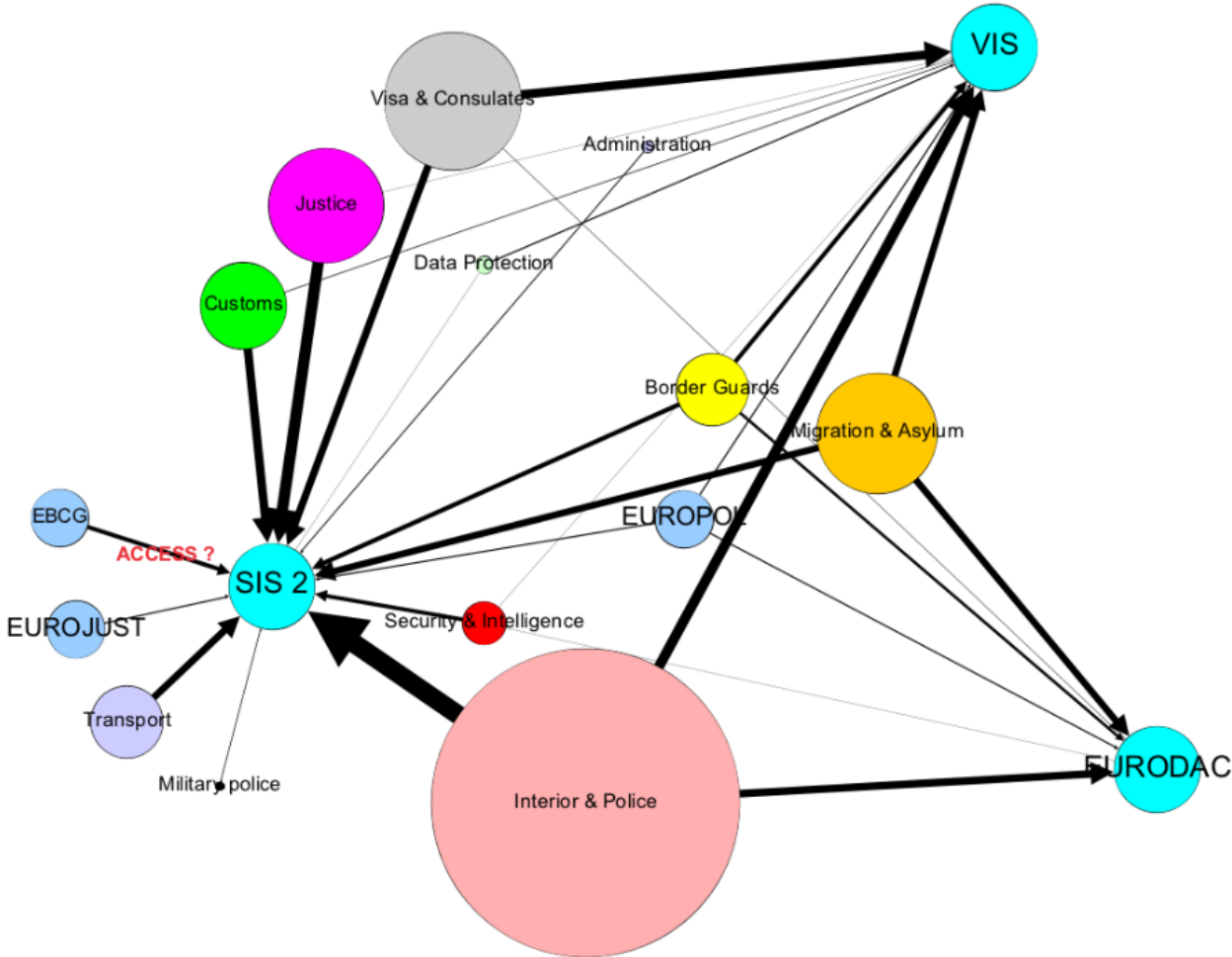
According to Article 1 of Decision 2008/633/JHA,²⁴⁴ Europol may access VIS for the purposes of combating terrorist and serious offences. Article 7 of Decision 2008/633/JHA makes provision for the creation of a specialised unit authorised to consult VIS data. Europol is authorised to retain VIS data for strategic purposes as long as the data has been anonymised. Eurojust is not granted access to VIS.

EU agencies in the network of databases

²⁴³ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L 180, 29.6.2013, p. 1–30.

²⁴⁴ Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, OJ L 218, 13.8.2008, p. 129–136.

Graph X.Y. EU agencies in the network databases



Source: Authors, 2016.

These access rights locate Eurojust, Europol and the future EBCG in different parts of the network of institutions that are authorised to connect to these three databases. These institutions are of different nature. For the sake of clarity, the graph below distinguishes nine categories of end-users. These categories are based on an examination of the lists of authorities that are authorised to connect to the three databases, and which are published by EU-LISA²⁴⁵. Where necessary, we explain what these categories refer to:

- Data Protection Authorities,
- Justice (courts, judges and prosecutors),
- Military police,
- General administration,

²⁴⁵ List of designated authorities which have access to data recorded in the Central System of Eurodac pursuant to Article 27(2) of Regulation (EU) No 603/2013, for the purpose laid down in Article 1(1) of the same Regulation, EU-LISA, 2015; List of competent authorities which are authorised to search directly the data contained in the second generation Schengen Information System pursuant to Article 31(8) of Regulation (EC) No 1987/2006 of the European Parliament and of the Council and Article 46(8) of Council Decision 2007/533/JHA on the establishment, operation and use of the second generation Schengen Information System, EU-LISA, 2015; Report on the technical functioning of VIS, including the security thereof, pursuant to Article 50(3) of the VIS Regulation, EU-LISA, 2015.

- Asylum and Migration Services (departments in charge of policing foreigners and services in charge of granting asylum),
- Police & Interior (general police services as well as forensic police services managing biometrics),
- Transport (vehicle registration, port authorities and other competent agencies),
- Security & Intelligence
Visa and Consulates.

The size of the nodes corresponding to end-users is proportional to the overall number of agencies in this category. For EU systems and agencies, nodes have a fixed size. Furthermore, the edges are weighted according to the degree of access that a category has with regard to one particular system. The thicker the edge, the closer the node of the agency is to one of the databases. Edges connecting EU agencies to EU databases have fixed thickness.

Three clusters appear in this network. On the left side, one finds institutions that are connected solely to SIS II. These are transport authorities, military police (only three agencies and approximately 350 end-users institutions) and Eurojust. It is to be noted that the future EBCG, if it were to be granted access to SIS II, would also probably sit in this region of the network. In the upper left-hand side, between the SIS II and the VIS nodes, one finds a second cluster composed of institutions that can access both databases. This cluster comprises customs and judicial authorities, which nonetheless remain overwhelmingly drawn towards SIS II where most of their access lies. It also contains data protection authorities, which, by contrast, are drawn towards VIS where most of their access is.

The third cluster corresponds to institutions that are granted access to the three databases: VIS, SIS II and EURODAC. This cluster is, first and foremost, clearly dominated by police and ministries of the interior, which enjoy the highest degree of access to the three databases, although they are closer to SIS II. Intelligence and national security services occupy a similar position, and it is to be noted that at least one national security service is granted access to EURODAC. Border guards, as well as migration and asylum departments, occupy a balanced position, located right in the middle of the three databases, since they have roughly equal access to all three.

Europol is located in this node of the network. As it stands, however, the access rights of Europol to SIS II are limited to alerts that do not directly pertain to border control purposes. In particular, Europol is excluded from the scope of art. 24 of Regulation (EC) No 1987/2006 dealing with third country nationals to be refused entry or stay into the Schengen Area. The same applies, *mutatis mutandis*, to Eurojust, whose access rights are limited to alerts covering criminal matters. If EBCG were granted access to SIS II, this regulation might be modified to open access rights of this article to the new agency.

Access rights to EURODAC and VIS would remain virtually the main vehicle of Europol's involvement in EU border control. On 31 December 2015 however, Europol was not connected to EURODAC (EU-LISA 2016). The impact of Europol's law enforcement checks in VIS on the issuing or refusal of visas remains unclear given the limited information published by eu-LISA to date. The technical reports on the operation of VIS (the 2016 version is still pending) makes no mention of checks by law enforcement authorities. Similarly, the conditions under which Europol staff anonymise VIS data before retention by Europol remain unclear. So are the strategic purposes that such retention supposedly serves.

The image that nonetheless emerges from these observations is one where the inter-relations across data systems that are designed to deal with criminal and violent practices (mainly SIS II) on the one hand, and the data systems that are designed to manage the movement of EU citizens and third country nationals allows for a logic of suspicion to override a logic of rights, especially when those are the rights of third country nationals. Furthermore, there seems to be an inherent contradiction between the original exclusion of Europol from the scope of Regulation (EC) No 1987/2006 on border control cooperation in the SIS II, and the access rights that were subsequently granted to Europol in VIS and EURODAC for the purposes of combating serious crimes and terrorism.

ANNEX 3. ANALYSIS OF MEMBER STATE NOTIFICATIONS ON THE REINTRODUCTION OF BORDER CONTROLS AT THE INTERNAL BORDERS OF THE SCHENGEN AREA, SEPTEMBER 2015-MAY 2016

Note on references to articles in the SBC Regulation: the Annex replicates the article references provided by Member State authorities in their notifications. Notifications sent before the entry into force of Regulation (EU) 2016/399 (published in the OJ on 23.3.2016) use the old article references of Regulation (EC) 562/2006, which is referred as SBC 2006.

Duration	Grounds & Scope	References
AUSTRIA		
16.9.2015- 25.9.2015 <i>10 days</i>	Legal basis Article 25 SBC 2006 (notification 17.09.2015, prolongations 28.09.2015, 16.10.2015)	<ul style="list-style-type: none"> ▪ Austrian delegation (2015) <i>Temporary reintroduction of border controls at the Austrian internal borders in accordance with Article 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 12110/15, 17.09.2015 ▪ Austrian delegation (2015) <i>Prolongation of temporary reintroduction of border controls at the Austrian internal borders in accordance with Article 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 12435/15, 28.09.2015 ▪ Austrian delegation (2015) <i>Prolongation of temporary reintroduction of border controls at the Austrian internal borders in accordance with Article 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across</i>
26.9.2015- 15.10.2015 <i>20 days</i>	Articles 23 & 24 SBC 2006 (prolongations - 18.11.2015, 15.02.2016, 16.3.2016) Article 29(2) SBC (notification - 13.05.2016)	
16.10.2015- 4.11.2015 <i>20 days</i>	Reasons <ul style="list-style-type: none"> ▪ 'The security situation caused by the huge migration flows to and via Austria and the reintroduction of border controls by Germany on 13 September 2015 [...] In view of the massive influx of third-country nationals, this measure is inevitable in order to prevent a threat to public order and internal security and a continuous overburdening of the police, emergency services and public infrastructure [...] The great willingness to help shown by the Republic of Austria over the past weeks should not be overstretched. Under European law, the Republic of Austria is not responsible for the vast majority of the persons concerned. This means that the Member State responsible not only registers those seeking protection, but also deals with the asylum procedure and, if their application for protection is rejected, takes measures to terminate their stay [...] The single European legal framework can function in its entirety only if all 	
5.11.2015- 15.11.2015 <i>11 days</i>		
16.11.2015- 16.3.2016 <i>120 days</i>		

Duration	Grounds & Scope	References
<p>16.03.2016-15.05.2016 <i>60 days</i></p> <p>16.05.2016-12.11.2016 <i>180 days</i></p>	<p>Member States act together to live up to their common responsibility' (notification 17.9.2015)</p> <ul style="list-style-type: none"> ▪ 'Due to the enormous migration flows to and across Austria, the security situation has continued to deteriorate dramatically [...] Only last weekend, in the time period from 18 to 21 September (15:00 hours) about 33.000 persons have illegally entered Austria. In order to cope with such influx, 17,700 individual accommodations were created in Austria in the last few days. This is a major challenge [...] which can only be managed by controlling the influx of these people in an orderly manner, and by police force and army using existing transportation means to distribute refugees to available accommodations. It is indispensable for this purpose, that the persons can be registered at the very border, and that they can be given medical care and initial food provisions' (prolongation notification 28.9.2015) ▪ 'Between 5 September and 8 October 2015, 07.00, a total of 238,485 persons were apprehended at the south-eastern borders of Austria, of which 9,107 applied for international protection in Austria. Since our last statement on 2 October, more than 44,000 persons apprehended [...] Austria intends to extend these internal border controls, depending on how the situation develops, on the basis of Art. 23 and Art. 24 of the Schengen Borders Code. This is the only way to avoid, wherever possible in practice and by law, security deficits in the Schengen area for the benefit of our citizens' (prolongation notification 16.10.2015) ▪ 'As no significant change of the situation has occurred so far, Austria will continue to carry out internal border controls until 15 February 2016 on the basis of Articles 23 and 24 of the Schengen Borders Code. This is the only way to prevent security deficits within the scope of what is legally and factually possible in the interest of all citizens of the Schengen area' (prolongation notification 18.11.2015) ▪ 'on account of the continuing influx [...] to avoid security deficits in the future [...] 268,520 persons have passed the Slovenian-Austrian border since 15 November 2015 [...] Thousands of accommodations have been created in Austria to cope with such influx of migrants. By 08 February 2016 (07:00 am), a total of 12,500 provisional accommodations are operative, and there are currently 4,964 vacancies still available' (prolongation notification 15.2.2016) – NB: 'Austria would like to thank the European Commission for undertaking the necessary steps to apply Article 26 of the Schengen Borders Code' ▪ 'Although, not least because of the measures taken by Austria in close cooperation with the West Balkan States, the situation at the Slovenian border has somewhat eased, we cannot assume that any noticeable reduction of the 	<p><i>Schengen borders (Schengen Borders Code). Brussels, Council document 13127/15, 16.10.2015</i></p> <ul style="list-style-type: none"> ▪ Austrian delegation (2015) <i>Prolongation of temporary reintroduction of border controls at the Austrian internal borders in accordance with Article 25, and thereafter on the basis of Articles 23 and 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code). Brussels, Council document 14211/15, 18.11.2015</i> ▪ Austrian delegation (2016) <i>Prolongation of temporary reintroduction of border controls at the Austrian internal borders in accordance Articles 23 and 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code). Brussels, Council document 6071/16, 15.02.2016</i> ▪ Austrian delegation (2016) <i>Prolongation of temporary reintroduction of border controls at the Austrian internal borders in accordance Articles 23 and 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code). Brussels, Council document 7136/16, 16.3.2016.</i> ▪ Austrian delegation (2016) <i>Prolongation of temporary reintroduction of border controls at the Austrian internal borders in accordance with Article 29(2) of Regulation (EU) No 2016/399 on a Union Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code).</i>

Duration	Grounds & Scope	References
	<p>influx of third country nationals will be sustainable [...] Austria, due to ascertained and still prevailing serious flaws in external border controls in Greece will continue to conduct internal border controls for another 2 months' (prolongation notification 16.3.2016)</p> <ul style="list-style-type: none"> ▪ 'The Council has adopted a recommendation, based on the Commission's proposal, to prolong proportionate temporary controls at certain internal Schengen borders for a maximum period of six months, due to exceptional circumstances where the overall functioning of the Schengen area is put at risk' (prolongation notification 13.05.2016) <p>Scope</p> <p>'The main focus will be, firstly, the land border between Austria and Hungary, but also the land borders with Italy, Slovenia and Slovakia' (notification 17.9.2015)</p> <p>'It will be necessary to continue to temporarily position adequate police forces at the border crossings initially with Hungary and Slovenia, subsequently if necessary also at border crossings with other neighbouring States [...] Austrian internal Schengen land and air borders' (prolongation notification 28.9.2015)</p> <p>Not specified in prolongation notification 16.10.2015</p> <p>Austrian-Slovenian border, detailed Annex in prolongation notification 18.11.2015, whereby the 'crossing of the internal border is [...] only possible and permitted at designated border crossings'</p> <p>'The focus will be, as before, at the Austrian-Slovenian border, but may be transferred at any time in view of possible shifts of irregular migration flows' (prolongation notification 15.2.2016)</p> <p>'The focal points will be at the Slovenian-Austrian, Hungarian-Austrian, and Italian-Austrian borders, but in view of possible shifts of the irregular flows of migrants such focal points may move at any time to other sections of our borders' (prolongation notification 16.3.2016)</p> <p>Not specified in prolongation notification of 13.05.2016</p>	<p>Brussels, Council document 8947/16, 13.05.2016</p>
BELGIUM		

Duration	Grounds & Scope	References
<p>23.2.2016- 23.3.2016</p> <p><30 days</p> <p>24.3.2016- 12.4.2016</p> <p><20 days</p>	<p>Legal basis</p> <p>Articles 23 & 24 SBC 2006 (25.2.2016)</p> <p>Modified to Article 25 SBC 2006 (11.3.2016)</p> <p>Prolonged with reference to Article 25.3 SBC 2006 and Article 23-24 SBC 2006 (22.3.2016), then Article 25 and 23 & 24 SBC 2006 (29.3.2016)</p> <p>Reasons</p> <ul style="list-style-type: none"> ▪ 'serious risk to public order and internal security because of very large numbers of illegal migrants that can be expected in the coastal region of Belgium within a short period of time [...] measure to prevent escalating situation' (notification 25.2.2016) ▪ 'The Belgian authorities expect the announced closure and evacuation of the migrant camps in the Nord-Pas-de-Calais region in France, to have a serious impact on Belgian territory' (notification 25.2.2016) ▪ 'We have come to understand that the procedure under article 25 [SBC] [...] applies to situations where a serious threat to the public policy or internal security in a Member State requires immediate action to be taken, including the case of an evolving situation which requires urgent action' (notification 11.3.2016) ▪ 'The Police are confronted with an increasing number of criminal organisations involved in the trafficking and smuggling of human beings to West-Vlaanderen and to the Port of Zeebrugge. Violent incidents with these criminal organisations are reported far more frequently than before [...] visual presence of the significantly increased number of irregular and homeless migrants has a direct and non-negligeable negative impact on public security [...] security situation in the Port of Zeebrugge has deteriorated frighteningly due to the regular illegal intrusions in the portal area [...] The expected and announced closures of illegal settlements of migrants around the main portal areas of Calais and Dunkirk in the North of France will most likely generate a further significant growth of the number of irregular migrants' (notification 25.2.2016) ▪ 'Even though the number of transmigrants dropped significantly in the days following the implementation of the border controls, indicating the dissuasive effect of our measures, the security impact remains high [...] to do everything possible to prevent the emergence of tent camps that have a serious impact 	<ul style="list-style-type: none"> ▪ Belgian delegation (2016) <i>Temporary reintroduction of border controls at the Belgian internal borders in accordance with Article 23 and 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 6490/16, 25.2.2016 ▪ Belgian delegation (2016) <i>Temporary reintroduction of border controls at the Belgian internal borders in accordance with Article 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 6490/1/16, 11.3.2016 ▪ Belgian delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Belgian internal borders in accordance with Article 23 and 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 7351/16, 22.3.2016 ▪ Belgian delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Belgian internal borders in accordance with Article 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 7351/1/16, 29.3.2016 ▪ Belgian delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Belgian internal borders in accordance with</i>

Duration	Grounds & Scope	References
	<p>on the internal security [...] many migrants try to get into the Zeebrugge port area which results in well-known security and safety risks [...] hazards to the physical integrity and wellbeing of the migrants [...] also a lot of material damage. In addition, this has an impact on the general feeling of insecurity of the inhabitants of the region [...] The border controls of the past month [...] have had an impact on organised immigration crime, since special attention was also given to human smuggling' (prolongation notification, 22.3.2016)</p> <ul style="list-style-type: none"> ▪ 'number of intercepted transmigrants has dropped after the introduction of border controls at the end of February, but last week a new rise could be noticed. The risk is real that this rise will continue because of the start of the summer season and the better weather conditions [...] one also needs to take into account the further evacuation of tent camps in the north of France' (prolongation notification 13.4.2016) <p>Scope</p> <p>Land border between the Province of West-Vlaanderen and France</p>	<p><i>Article 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code). Brussels, Council document 7873/16, 13.4.2016</i></p>
DENMARK		
<p>04.01.2016-03.04.2016 < 90 days</p> <p>04.04.2016-03.05.2016 30 days</p> <p>04.05.2016-02.06.2016 30 days</p> <p>20.06.2016-12.11.2016</p>	<p>Legal basis</p> <p>Articles 23 & 25 SBC 2006</p> <p>Articles 23 & 24 SBC 2006 (prolongation notification 4.3.2016)</p> <p>Article 29 (2) SBC (prolongation notification 02.6.2016)</p> <p>Reasons</p> <ul style="list-style-type: none"> ▪ 'Since the beginning of September 2015 [...] more than 91.000 migrants and refugees have crossed the border between Denmark and Germany [...] more than 13.000 people have applied for asylum in Denmark bringing the total number of asylum seekers in 2015 up to more than 21.000. [...] Furthermore [...] at least 50 percent of the persons who have crossed the border between Denmark and Germany are not in possession of a passport or lawful 	<ul style="list-style-type: none"> ▪ Danish delegation (2016) <i>Temporary reintroduction of border controls at the Danish internal borders in accordance with Article 23 and 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code). Brussels, Council document 5021/16, 5.1.2016</i> ▪ Danish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Article 23 and 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code).</i>

Duration	Grounds & Scope	References
<p>< 150 days</p>	<p>identification [...] The Swedish, the Norwegian and the German Governments have already temporarily reintroduced border controls at their internal borders. Furthermore, today on 4 January 2016 the Swedish Government has implemented a new regulation obliging carriers to ensure that the persons they are transporting into Sweden are in possession of identity documents [...] Given that there is no land border between Denmark and Sweden, the internal border control reintroduced by the Swedish Government combined with the new regulation [...] will in fact result in a closed border for immigrants and asylum seekers with no identification [...] Due to these measures set in place by our neighboring countries and particularly the measures set in place by Sweden, Denmark is of now faced with a serious risk to public order and international security because a very large number of illegal immigrants may be stranded in the Copenhagen area within a short period of time' (notification 5.1.2016)</p> <ul style="list-style-type: none"> ▪ 'On 7 January 2016, the Swedish Government decided to prolong the border control at the Swedish internal borders until 8 February 2016. Furthermore, the Swedish regulation [mentioned in previous letter] [...] is still in force [...] the number of immigrants crossing EU's southern external borders and continuing their journey further north remains very high' (prolongation notification 14.1.2016) ▪ 'On 4 February 2016, the Swedish Government decided to prolong the border control at the Swedish internal borders until 9 March 2016 [...] The number of asylum seekers in Europe are still historically high, and according to Frontex, there is an ongoing pressure on Europe's external borders. Our neighboring countries to the North have prolonged their temporary border controls and still have ID-controls at their internal borders in order to reduce the numbers of asylum seekers. These measures have [...] left Denmark with a serious risk to public policy and internal security if the Danish border control were to be lifted at this point' (prolongation notifications of 23.2.2016 and 4.3.2016) ▪ 'From 6 September 2015 [...] until 27 March, the Danish Police assesses that a total of approximately 94,700 immigrants and asylum seekers have entered Denmark. From 4 January until 27 March 2016, approximately 2,850 immigrants and asylum seekers have entered Denmark and approximately 488,000 people have been checked at border crossings. In the same period, 984 people have been refused entry and 127 people have been charged with human trafficking [...] The Danish Police has not since 4 January 2016 reported any build-up of illegal immigrants anywhere in the country [...] Denmark has received a historical high number of asylum seekers in 2015. In November alone, Denmark received around 5,100 asylum seekers including around 500 unaccompanied minor asylum seekers [...] Even though the number of asylum 	<p>Brussels, Council document 5247/16, 14.1.2016</p> <ul style="list-style-type: none"> ▪ Danish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Article 23 and 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 5786/16, 3.2.2016 ▪ Danish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Article 23 and 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 6440/16, 23.2.2016 ▪ Danish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Article 23 and 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 6754/16, 4.3.2016 ▪ Danish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Article 23 and 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 7499/16, 1.4.2016

Duration	Grounds & Scope	References
	<p>seekers has decreased since the introduction of temporary border controls, the number of asylum seekers seems to remain at a relatively high level'. <i>Follows the reference to Swedish border controls</i> (prolongation notification 1.4.2016)</p> <ul style="list-style-type: none"> ▪ 'The decision to temporarily reintroduce border control at the Danish internal borders was made due to the measures set in place by our neighbouring countries and particularly the measures set in place by Sweden. As a consequence of these measures, Denmark is faced with a serious risk to public order and internal security because a very large number of illegal immigrants might be stranded in the Copenhagen area within a short period of time [...] The numbers of asylum seekers in Europe are still historically high, and according to Frontex, there is an ongoing pressure on Europe's external borders. Our neighboring countries to the North have prolonged their temporary border controls and still have ID-controls at their internal borders in order to reduce the number of asylum seekers' (notification prolongation 3.5.2016) ▪ Council Implementing Decision of 12 May 2016 (prolongation notification 2.6.2016) <p>Scope</p> <p>'The border control may extend to all internal borders, including land-, sea- and air borders, whereby the specific border sections and border crossing points are determined by the Danish Police. The border control will initially focus on the ferries arriving from Germany to the harbours in Gedser, Roedby and Roenne, and the land border between Denmark and Germany' (notification 5.1.2016).</p> <p>'The border control will, however, remain focused on the ferries arriving from Germany and the land border between Denmark and Germany' (prolongation notification 14.1.2016).</p> <p>Prolongation notification of 1.4.2016 specifies 'the Danish-German border in Southern Jutland'.</p>	<ul style="list-style-type: none"> ▪ Danish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 25 and 26 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 8571/16, 3.5.2016 ▪ Danish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Norwegian internal borders in accordance with Article 29(2) of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 9792/16, 2.6.2016
FRANCE		
13.11.2015 13.12.2015 30 days	<p>– Legal basis Articles 23 & 24 SBC 2006 (notification of 22.10.2015, prolongations - 10.12.2015, 11.02.2016, 29.03.2016)</p>	<ul style="list-style-type: none"> ▪ French delegation (2015), <i>Temporary reintroduction of border controls at the French internal borders in accordance with Articles 23</i>

Duration	Grounds & Scope	References
<p>14.12.2015-27.04.2016 < 90 days</p> <p>27.04.2016 – 26.05.2016 30 days</p> <p>27.05.2016 – 26.07.2016 30 days</p>	<p>Prolongation notification of 29.3.2016 explicitly cites Articles 23(3) and 23a SBC 2006; Articles 25 & 26 SBC (prolongation notification of 26.04.2016); Articles 25 & 27 SBC (notification of 27.05.2016);</p> <p>Reasons</p> <ul style="list-style-type: none"> ▪ Initial notification in French linked reintroduction of internal border controls at identified border crossings to the UN Climate Change Summit (COP21), that was held in Paris from 30th of November to 11 of December (notification of 22.10.2015) ▪ 'The terrorist attacks that took place in Paris on 13 November 2015 led the government to declare a state of emergency throughout the country [...] owing to the imminent danger resulting from serious breaches of public order' (prolongation notification 10.12.2015) ▪ 'Given that the terrorist threat remains, the French Government has decided to extend the reintroduction of controls at its borders with all neighbouring countries for a period of 30 days, i.e. 27 February to 27 March' (prolongation notification 11.02.2016) ▪ 'Following the terrorist attacks in Paris on 13 November 2015 and the state of emergency imposed in France for three months, then renewed for three months [...] due to the ongoing terrorist threat, the French Government has decided to extend the reintroduction of controls at its borders with all neighbouring countries for a period of 30 days, i.e. 28 March to 26 April 2016 (prolongation of 29.03.2016). ▪ 'In light of the major ongoing terrorist threat, illustrated by the attack on Brussels on 22 March 2016, the French Government has decided to extend these border controls until 26 May 2016 inclusive.' (prolongation notification of 26.04.2016). ▪ 'France will soon be hosting two major sporting events on its mainland territory: UEFA Euro 2016 from 10 June to 10 July 2016, and the Tour de France from 2 to 24 July 2016. Given the magnitude of these events and the millions of spectators they will attract from many countries, as well as the risk analysis which has been carried out, there is an expected risk of disturbances to public order arising from these events. This risk is heightened by the terrorist threat which France and the whole of Europe have been facing in recent months. [...] France has decided to reintroduce border controls [...] for the period from 27 May to 26 July 2016.' 	<p><i>and 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code). Brussels, Council document, 13171/15, 22.10.2015.</i></p> <ul style="list-style-type: none"> ▪ French delegation (2015), <i>Prolongation of temporary reintroduction of border controls at the French internal borders in accordance with Article 23 and 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 15181/15, 10.12.2015 ▪ French delegation (2016), <i>Prolongation of temporary reintroduction of border controls at the French internal borders in accordance with Article 23 and 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 5981/16, 11.02.2016 ▪ French delegation (2016), <i>Prolongation of temporary reintroduction of border controls at the French internal borders in accordance with Article 23 and 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 7360/1/16, 29.03.2016 ▪ French delegation (2016), <i>Prolongation of the temporary reintroduction of border controls at the French internal borders in accordance with Articles 25 and 26 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across</i>

Duration	Grounds & Scope	References
	<p>Scope General scope - 'internal borders with Belgium, Luxembourg, Germany, the Swiss Confederation, Italy and Spain, and at the air borders, for the duration of the state of emergency from 14 December 2015 to 26 February 2016, that was prolonged until 26 of July (notification of 27.05.2016)</p> <p>NB: reintroduction of border controls prolonged from the re-imposition initially linked to COP21, then prolongation was linked to Brussels attacks. Finally, the French authorities have re-started the procedure of notifications on 27 of May, 2016, with a new foreseeable threat due to UEFA Euro 2016 and Tour de France sporting events and inter-related terrorist threat.</p>	<p><i>borders (Schengen Borders Code)</i>, Council document 8217/16, Brussels, 26.04.2016.</p> <ul style="list-style-type: none"> ▪ French delegation (2016), <i>Temporary reintroduction of border controls at the French internal borders in accordance with Articles 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)</i>. Brussels, Council document 9506/16, 27.05.2016.
GERMANY		
<p>13.9.2015-22.9.2015</p> <p>23.9.2015-12.10.2015</p> <p>13.10.2015-1.11.2015</p> <p>2.11.2015-13.11.2015</p> <p><60 days</p> <p>14.11.2015-13.5.2016</p> <p><180 days</p>	<p>Legal basis</p> <p>Art. 25 SBC 2006</p> <p>Articles 23 & 24 SBC 2006</p> <p>Article 29 (2)</p> <p>Reasons</p> <ul style="list-style-type: none"> ▪ 'This action is urgently needed in view of the enormous influx of third-country nationals referred to above. We must know who is entering and staying in Germany. Further arrivals would endanger the public order and internal security [...] Over the past weeks, there has been a great willingness in Germany to help. We must not wear out this good will. According to European law, the Federal Republic of Germany is not responsible for the large majority of these persons. The Common European Asylum System, including the Dublin process and the EURODAC regulations, continues to apply. This means that the responsible Member State must not only register those seeking protection, but must also process their applications and take measures to end their stay if their application for protection is rejected' (notification 14.9.2015) ▪ 'The situation remains the same. The massive influx of third-country nationals continues unabated. For reasons of public safety and public order, a structured procedure, especially in terms of registration and vetting of third-country nationals, continues to be urgently necessary. Especially in view of the thousands of third-country nationals coming to Germany from crisis and conflict regions, we must avoid security deficits, wherever possible in practice and by 	<ul style="list-style-type: none"> ▪ German delegation (2015) <i>Temporary reintroduction of border controls at the German internal borders in accordance with Article 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document, 11988/15, 14.09.2015. ▪ German delegation (2015) <i>Prolongation of the temporary reintroduction of border controls at the German internal borders in accordance with Article 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document, 12984/15, 13.10.2015. ▪ German delegation (2015) <i>Prolongation of the temporary reintroduction of border controls at the German internal borders in accordance with Article 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>.

Duration	Grounds & Scope	References
	<p>the law, for the benefit of our citizens' (prolongation notification 13.10.2015 – NB: dated 22.9.2015, received by Council SecGen 8.10.2015)</p> <ul style="list-style-type: none"> ▪ 'The uncontrolled and massive influx of third-country nationals via the external borders that we are currently experiencing continues unabated. This and the fact that third-country nationals travel on within the Schengen area is not acceptable. I am now informing you that I intend to extend these internal border checks, depending on how the situation develops, on the basis of Articles 23 and 24 of the Schengen Borders Code. This is the only way to avoid, wherever possible in practice and by law, security deficits in the Schengen area for the benefit of our citizens' (prolongation notification 13.10.2015 – NB dated 9.10.2015, received by Council SecGen 12.10.2015) ▪ 'The Federal Republic of Germany continues to receive an unprecedented and uncontrolled influx of migrants seeking asylum. No other Member State of the European Union is affected to such a degree. This influx seriously affects Germany's public order and internal security in various ways [...] I would also like to reiterate that the situation in Germany mainly depends on the measures taken by the responsible Member States to protect the EU's external borders. Unfortunately, I still have the impression that, despite European assistance, the necessary level of protection is not guaranteed. Moreover, transit countries within the Schengen area seem to be unable or unwilling to take the measures required by EU legislation to register and check each and every migrant. Especially with regard to persons who may have been radicalized in crisis and conflict regions, threats related to uncontrolled migration are obvious. Human smuggling and related crime have developed in a way that is not acceptable' (prolongation notification 30.10.2015) ▪ 'No lasting or significant reduction in the numbers of third-country nationals entering German territory has occurred which would enable the suspension of temporary controls at the internal borders [...] temporary border checks concentrated on the internal land borders between Germany and Austria continue to be an effective and necessary instrument to ensure orderly procedures at the border (including checking databases of wanted persons, photographing and fingerprinting those entering, denying entry to third-country nationals who are not seeking protection and who entered the Schengen area illegally) to manage the influx of refugees and address aspects of public order and internal security. To prevent any security gaps, we have made further progress especially with regard to photographing and fingerprinting those entering Germany [...] Together, we in Europe must succeed in significantly reducing and slowing the influx of refugees in order not 	<p>Brussels, Council document, 12985/15, 13.10.2015.</p> <ul style="list-style-type: none"> ▪ German delegation (2015) <i>Prolongation of the temporary reintroduction of border controls at the German internal borders in accordance with Article 25, and thereafter on the basis of Articles 23 and 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document, 13569/15, 30.10.2015. ▪ German delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the German internal borders in accordance with Articles 23 and 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document, 6048/16, 12.02.2016. ▪ German delegation (2016), <i>Prolongation of the temporary reintroduction of border controls at the German internal borders in accordance with Articles 29(2) of Regulation (EU) No 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)</i>, Brussels, Council document 8930/16, 13.05.2016.

Duration	Grounds & Scope	References
	<p>to place excessive demands on our citizens and to prevent resentment' (prolongation notification 12.2.2016)</p> <ul style="list-style-type: none"> ▪ NB: 'If the migration situation does not change significantly by May 2016, checks at the German borders will still be necessary. With this in mind, I am glad that the European Commission is now examining the application of the crisis mechanism pursuant to Article 26 of the Schengen Borders Code' (prolongation notification 12.2.2016) <p>Scope</p> <p>'Germany's Schengen land, air and sea borders as the situation requires [...] The controls will initially be concentrated on the German-Austrian land border' (notification 14.9.2015)</p>	
MALTA		
<p>9.11.2015-31.12.2015</p> <p><30 days</p>	<p>Legal basis</p> <p>Article 23 et seq SBC</p> <p>Reasons</p> <ul style="list-style-type: none"> ▪ Valetta Conference on Migration and Commonwealth Heads of Government Meeting and terrorist threat and smuggling of illegal migrants (European Commission)'threat scenarios in international major events and also in the light of the continuous risk of Islamic terrorist illicit activities and attacks' (initial notification, 16.10.2015 and subsequent prolongations) ▪ 'Threat scenarios in international major events and particularly in the light of the continuous risk of terrorist activities and attacks' (report 16.12.2015) ▪ 'The situation with regard to the global terrorist threat, as well as in view of the fact that Malta was in the process of addressing a smuggling ring that was targeting Malta as a destination for illegal migrants travelling from other Schengen states, which had emerged from the controls carried out in the previous period where the controls were reintroduced in view of the Valletta Summit on Migration and the Commonwealth Heads of Government (CHOGM) Meeting. The retention of border control was also deemed necessary with a view to detecting any potential threats to other Member States. The Maltese government also took into account Malta's proximity to Libya, where the 	<ul style="list-style-type: none"> ▪ Maltese delegation (2015) <i>Temporary reintroduction of border controls at the Maltese internal borders in accordance with Article 23 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 13129/15, 16.10.2015. ▪ Maltese delegation (2015) <i>Temporary reintroduction of border controls at the Maltese internal borders in accordance with Article 23 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code) – change of dates</i>. Brussels, Council document 13788/15, 06.11.2015. ▪ Maltese delegation (2015) <i>Report on the temporary reintroduction of border controls at the Maltese internal borders in accordance with Article 23 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across</i>

Duration	Grounds & Scope	References
	<p>situation of instability facilitates the promulgation of extremist ideology across the territory' (report 26.02.2016)</p> <p>Scope</p> <ul style="list-style-type: none"> ▪ Malta International Airport ▪ Valletta Sea Passenger Terminal 	<p><i>Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 15366/15, 16.12.2015.</p> <ul style="list-style-type: none"> ▪ Maltese delegation (2016) <i>Report on the temporary reintroduction of border controls at the Maltese internal borders in accordance with Article 29 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 6514/16, 26.2.2016
NORWAY		
<p>26.11.2015-06.12.2015 (10 days)</p> <p>15.01.2016 (60 days Art. 25)</p> <p>15.01.2016 – 12.05.2016 (120 days, Art. 24)</p> <p>12.05.2016 – 11.06.2016 (30 days, Art. 26)</p> <p>10.06.2016 – 11.11.2016 (150 days)</p>	<p>Legal basis</p> <p>Articles 23 & 25 SBC 2006 (notification 25.11.2015)</p> <p>Article 25 SBC 2006 (prolongation notification 04.12.2015)</p> <p>Article 24 SBC 2006 (prolongation notification of 15.01.2016, 12.02.2016, 15.03.2016, 14.04.2016)</p> <p>Article 26 SBC (prolongation notification of 12.05.2016)</p> <p>Article 29 (2) SBC (prolongation notification 10.06.2016)</p> <p>Reasons</p> <ul style="list-style-type: none"> ▪ 'Norway is [...] currently facing an unpredictable migratory flow, containing a mix of asylum seekers, economic migrants, potential criminals such as smugglers or traffickers of human beings, also including potential victims of crime [...] also knowing that many of the migrants arriving to Norway have not been subject to border control upon arrival to the EU/Schengen territory, there is a need already at the internal borders to distinguish between the different categories of arriving migrants. Border control will help identifying the different categories of migrants, enabling adequate support and control procedures, i.e. registration, further identification and return of those in no need for protection 	<ul style="list-style-type: none"> ▪ Norwegian delegation (2015) <i>Temporary reintroduction of border controls at the Norwegian internal borders in accordance with Article 23 and 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, 14633/15, 25.11.2015 ▪ Norwegian delegation (2015) <i>Prolongation of the temporary reintroduction of border controls at the Norwegian internal borders in accordance with Article 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, 14996/15, 04.12.2015 ▪ Norwegian delegation (2015) <i>Prolongation of the temporary reintroduction of border controls at the Norwegian internal borders in accordance with Article 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons</i>

Duration	Grounds & Scope	References
	<p>[...] the current number of migrants arriving to Norway, and the consequences for Norwegian society' (notification 25.11.2015)</p> <ul style="list-style-type: none"> ▪ 'There has been a decrease in the number of migrants applying for asylum in Norway lately, but the number is still very high, and we still experience an uncontrolled and unpredictable influx of migrants. We thereby find the conditions and reasoning in [...] letter of 25. November for reintroduction of border control still to be valid' (prolongation notification 4.12.2015) ▪ 'There has been a further decrease in the number of migrants applying for asylum in Norway. The measures taken, including the reintroduction of internal border control at our sea borders, have had the desired effect. We have during this period been able to distinguish between the different categories of arriving migrants already on the internal border. Although there has been a significant decrease in the number of migrants applying for asylum in Norway, we fear that the situation may change rapidly again if we abolish the introduced internal border control' (prolongation notification 21.12.2015). ▪ 'Since our letter 18 December 2015, there has been a further decrease in the number of migrants applying for asylum in Norway. Although there has been a significant decrease in the number of migrants applying for asylum in Norway, we fear that the situation may change rapidly again if we abolish the introduced internal border control. We thereby find the conditions and reasoning in my letters dated 25, November and 18,December still to be valid'. Prolongation notification, 15.01.2016). ▪ 'Since our letter dated 14 January, there has been a further decrease in number of of asylum seekers in Norway. However, we fear that this might change if border controls are lifted. Furthermore, as explained in my letter to Commissioner Dimitris Avramopoulos dated 28, January 2016, the Schengen external borders and the established migrant routes intra Schengen are not sufficiently controlled by the competent authorities at the moment, making illegal entry and secondary movements by unregistered migrants as a factor of concern.' (prolongation notification 12.02.2016). ▪ 'Since our letter dated 12.02.2016, the number of asylum seekers arriving in Norway continues to be low. However, we fear that this might change if controls are lifted as migratory pressure at the external border remains significant.' (prolongation notification 15.03.2016 and the same reasons reiterated in prolongation notification 14.04.2016). ▪ In 12.05.2016 prolongation notification the lines above are reiterated though it is added 'It is also important to view situation in the Nordic countries as a whole, and it is therefore for Norway to maintain the border controls along the 	<p><i>across Schengen borders (Schengen Borders Code)</i>. Brussels, 15497/15, 21.12.2015.</p> <ul style="list-style-type: none"> ▪ Norwegian delegation (2016), <i>Prolongation of the temporary reintroduction of border controls at the Norwegian internal borders in accordance wit Article 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)</i>. Brussels, Council document 5294/16, 15.01.2016. ▪ Norwegian delegation (2016), <i>Prolongation of the temporary reintroduction of border controls at the Norwegian internal borders in accordance wit Article 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)</i>. Brussels, Council document 6043/16, 12.02.2016. ▪ Norwegian delegation (2016), <i>Prolongation of the temporary reintroduction of border controls at the Norwegian internal borders in accordance wit Article 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)</i>. Brussels, Council document 7122/16, 15.03.2016. ▪ Norwegian delegation (2016), <i>Prolongation of the temporary reintroduction of border controls at the Norwegian internal borders in accordance wit Article 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)</i>. Brussels, Council document 7948/16, 14.04.2016.

Duration	Grounds & Scope	References
	<p>internal borders under Art.24 (NB. Council wrongly referred to new article 26 instead 27).'</p> <p>Scope</p> <p>'The border control may extend to all internal borders, ie air, sea and land borders, whereby the specific border section and border crossing point are determined by the National Police Directorate. The reintroduced border control will initially focus on ports with ferry connections to Norway via internal borders' (notification 25.11.2015).</p> <p>In subsequent notifications scope remains unclear as it is mentioned that 'controls remain limited' and also 'based on a risk assessment' and 'with minimal impact on regular travelers' though it is also suggested that 'the border control may, however extend to all internal borders, i.e. air, sea, land borders, if necessary.' In 12.02.2016 notification mentioned that there have been no negative reactions from the public.'</p>	<ul style="list-style-type: none"> ▪ Norwegian delegation (2016), <i>Prolongation of the temporary reintroduction of border controls at the Norwegian internal borders in accordance with Article 26 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)</i>. Brussels, Council document 8827/16, 12.05.2016. ▪ Norwegian delegation (2016), <i>Prolongation of the temporary reintroduction of border controls at the Norwegian internal borders in accordance with Article 29(2) of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)</i>. Brussels, Council document, 10135/16, 10.06.2016.
SLOVENIA		
<p>17.9.2015-26.9.2015</p> <p>27.9.2015-16.10.2015</p> <p><30 days</p>	<p>Legal basis</p> <p>Article 25 SBC 2006 (notification 17.09.2015, prolongations - 25.09.2015, 20.10.2015)</p> <p>Reasons</p> <ul style="list-style-type: none"> ▪ 'The current situation involving uncontrollable migration flows in the region, coupled with the measures recently adopted by the neighbouring countries, including reinstated border controls at the internal borders, presents a serious threat to Slovenia's national security [...] The extent and intensity of border controls will therefore depend on the security situation and particularly the number of migrants coming from Hungary [...] Slovenia sincerely hopes that all Member States, especially those at the external borders, will ensure appropriate level of border control in line with the Schengen standards and introduce adequate migration procedures to avoid having to apply this extraordinary measure at the internal borders' (notification 17.9.2015) 	<ul style="list-style-type: none"> ▪ Slovenian delegation (2015) <i>Temporary reintroduction of border controls at the Slovenian internal borders in accordance with Article 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document, 12111/15, 17.09.2015. ▪ Slovenian delegation (2015) <i>Prolongation of temporary reintroduction of border controls at the Slovenian internal borders in accordance with Article 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>.

Duration	Grounds & Scope	References
	<ul style="list-style-type: none"> ▪ 'Since the introduction of this measure [17.9.2015 reintroduction of border controls] the situation in the area of illegal migration has not changed significantly, nor have countries in the region introduced measures which would indicate that the situation would change' (prolongation notice 25.9.2015) ▪ 'We have again carefully assessed the situation, taking into account all the relevant indicators, and it has been established that to continue with this extraordinary measure would no longer be necessary and justified' (termination notification 20.10.2015) <p>Scope</p> <p>'Land internal border with the Republic of Hungary'</p> <p>Reporting</p> <p>'We have always taken into account the situation in our neighbourhood and in the region, especially measures taken by Austria and Hungary, but also other Member States, which could according to our assessments, have significant impact on the migration route and consequently on the increased pressure on this part of the Slovenian border. In addition, the existing trends, available data and risk analysis have been considered when adopting our measures. It was especially on this basis that we decided for the prolongation of the temporary internal border control after the initial 10 days [...] we have assessed with great care the necessity and proportionality of such measure, bearing in mind at all times that the reintroduction of internal border controls is only a temporary measure of last resort [...]'</p> <p>'According to the available statistical data there was an overall increase of the illegal crossings at the internal borders during the first eight months of 2015 (compared to the same period of the previous year). The biggest increase (more than 300%) was in fact noted at the Slovenian-Hungarian land border. Already prior to the reintroduction of border controls numerous cases of illegal border crossings (mostly by citizens of Afghanistan, Pakistan and Bangladesh) from Hungary towards Italy were identified. These experiences and the fact that almost simultaneously, on 16 September 2015, Austria also reintroduced border controls at the Hungarian border led us to the reasonable conclusion that a significant part of migration flow could be diverted towards Slovenia. Taking all these circumstances into account it was</p>	<p>Brussels, Council document, Council document, 12418/15, 25.09.2015.</p> <ul style="list-style-type: none"> ▪ Slovenian delegation (2015) <i>Termination of the temporary reintroduction of border controls at the Slovenian internal borders in accordance with Article 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document, 13170/15, 20.10.2015. ▪ Slovenian delegation (2015) <i>Report on the temporary reintroduction of border controls at the Slovenian internal borders in accordance with Article 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document, 14212/15, 18.10.2015.

Duration	Grounds & Scope	References
	<p>assessed that only compensatory measures would not be enough to efficiently control the migration flow'</p> <p>Results: 5.852 checks of vehicles and 18.706 persons were checked, 35 persons were refused entry to Slovenia, in most cases because they were not in possession of a valid travel document, visa or residence permit. 138 hits in SIS and 5 hits in Interpol databases, 218 'repressive measures' issued, 13 cases of document fraud identified, 3 persons applied for international protection</p> <p>'Although initially foreseen to be carried out at different most important communications for the cross-border traffic at this section of the border, the border control was later in fact carried out only at one of them. The control of vehicles and persons was carried out on a selective basis in accordance with the risk analysis. The railway communications were not part of the control'</p> <p>(Report 18.10.2015)</p>	
SWEDEN		
<p>12.11.2015-09.01.2016 <60 days</p> <p>10.01.2016-08.04.2016 <90 days</p> <p>09.04.2016-08.05.2016 30 days</p> <p>09.05.2016-07.06.2016 30 days</p>	<p>Legal basis</p> <p>Articles 23 & 25 SBC 2006 (notification 12.11.2015, prolongation 20.11.2015, 11.12.2015, 18.12.2015, 07.01.2016)</p> <p>Articles 23 & 24 SBC 2006 (prolongation 08.02.2016, 08.03.2016, 08.04.2016)</p> <p>Articles 25 & 27 SBC 2006 (prolongation notification 04.05.2016)</p> <p>Article 29(2) SBC (prolongation notification 06.06.2016)</p> <p>Reasons</p> <ul style="list-style-type: none"> ▪ 'Sweden is currently facing an unprecedented migratory flow. The flows are mixed and may include i.a. asylum seekers, economic migrants, potential criminals such as smugglers or traffickers of human beings, but also potential victims of crime. People now arriving in Sweden, not seeking to legalise their stay, constitute easy targets for perpetrators ready to abuse their vulnerable situation [...] The fact that the migratory flow are mixed creates great difficulties, whereby a reintroduction of border control at internal borders by way of identifying the different categories of persons, would facilitate the 	<ul style="list-style-type: none"> ▪ Swedish delegation (2015) <i>Temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 23 and 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 14047/15, 12.11.2015. ▪ Swedish delegation (2015) <i>Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 23 and 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 14383/15, 20.11.2015.

Duration	Grounds & Scope	References
08.06.2016- 11.11.2016 180 days	<p>agency's [Swedish Migration Agency] work [...] The Swedish Civil Contingencies Agency [...] reported that the migratory flows now lead to extreme and increasing challenges regarding the functionality of the Swedish society, which is one of the three goals of Swedish security. The agency points to severe strains on mainly housing, health care, schooling and social services, but also other areas vital to the functioning of the society [...] As a consequence there is a need to already at the border, before the migrants disappear into the country or go into hiding, be able to distinguish between the different categories of people. The border control will help directing the different categories of persons to the correct services, be it the Swedish Migration Agency, the Swedish Police Authority, the social services or some other relevant service. It will also enable the prevention and detection of serious crime [...] the possibility for immediately distinguishing between the various categories and identifying the persons will contribute to different services' capacity to manage the people falling under their responsibility. In that way, border control will contribute to the functionality of the Swedish society and thereby to the goals of Swedish security' (notification 12.11.2015)</p> <ul style="list-style-type: none"> ▪ 'In its most recent situational picture, the Swedish Civil Contingencies Agency states that the challenges for a range of important services in Swedish society are likely to increase and the situation is likely to deteriorate' (prolongation notification 20.11.2015, reiterated in prolongation notification 11.12.2015) ▪ 'The Swedish Civil Contingencies Agency states that the challenges for a range of important services in Swedish society are great and the strained situation is likely to remain so for some time. The influx of asylum applicants in Sweden has decreased, but still remains very high, especially for this time of year' (prolongation notification 18.12.2015) ▪ 'The Swedish Civil Contingencies Agency states that the challenges for a range of important services in Swedish society are great and the strained situation is likely to remain so for some time. The influx of asylum applicants in Sweden has decreased, but still remains very high, especially for this time of year' (prolongation notification 07.01.2016, same as 18.11.2015) ▪ 'Although the number of new asylum seekers has decreased, the effects from the unprecedented migratory pressure in the latter part of 2015 combined with the current influx, still makes the situation very challenging for many of the important services in Sweden' (prolongation notification 08.02.2016, 08.03.2016, 08.04.2016, 04.05.2016) ▪ 'On 12 May 2016, the Council of the European Union, based on the proposal of the European Commission, adopted a Council Implementing Decision setting out a Recommendation for temporary internal border control in exceptional 	<ul style="list-style-type: none"> ▪ Swedish delegation (2015) <i>Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 23 and 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 15253/15, 11.12.2015. ▪ Swedish delegation (2015) <i>Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 23 and 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 15456/15, 18.12.2015. ▪ Swedish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 23 and 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 5103/16, 07.01.2016. ▪ Swedish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 23 and 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 5914/16, 08.02.2016. ▪ Swedish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance</i>

Duration	Grounds & Scope	References
	<p>circumstances putting the overall functioning of the Schengen area at risk. The Implementing Decision recommends Sweden to maintain proportionate temporary border control for a maximum period of six months' (prolongation 06.06.2016)</p> <p>Scope</p> <p>'The border control may extend to all internal borders, including land-, sea- and air borders, whereby the specific border sections and border crossing points are determined by the Swedish Police Authority. [...] the control will initially focus on selected harbours in Police Region South and Police Region West as well as on the Öresund Bridge between Denmark and Sweden.</p> <p>Unchanged since 12 November 2015, see below.</p>	<p><i>with Article 23 and 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code). Brussels, Council document 6886/16, 08.03.2016.</i></p> <ul style="list-style-type: none"> ▪ Swedish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 23 and 24 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code). Brussels, Council document 7716/16, 08.04.2016.</i> ▪ Swedish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 26 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code). Brussels, Council document 8827/16, 12.05.2016.</i> ▪ Swedish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Articles 25 and 27 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code). Brussels, Council document 8667/16, 04.05.2016.</i> ▪ Swedish delegation (2016), <i>Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 29(2) of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders</i>

Duration	Grounds & Scope	References
		<i>(Schengen Borders Code)</i> . Brussels, Council document 9865/16, 06.06.2016.

ANNEX 4. REPORT ON STAKEHOLDER DISCUSSION

Report on Stakeholder discussion

Venue: European Citizen Action Service
Avenue de la Toison d'or 77, 1060 Brussels, 1st floor

Date: 7 June 2016

Introduction and background:

The meeting started with a welcome speech by Assya Kavrakova, ECAS Director and Sergio Carrera, senior researcher at CEPS.

It was followed by a presentation of the preliminary results of the study by Lina Vosyliūtė, researcher at CEPS. The study provides a policy and legal analysis of two main documents: the Schengen Borders Code and the Schengen Evaluation and Monitoring mechanism and is based on a number of interviews conducted with experts of EU institutions and Permanent Representations of Member States. The stakeholder discussion was organised to verify if civil society organisations could play a role in these issues.

The final study will include recommendations for decision-makers and will be presented to the LIBE Committee of the European Parliament on 12 July 2016.

Part 1: Civil Society experience and positions in relation to free movement of persons, Schengen evaluation and monitoring mechanisms (SEM) and reintroduction of internal borders

The stakeholder discussion was moderated by Kenan Hadžimusić, Senior Manager at ECAS. The organisations presented their position on the Schengen agreement in the context of the current political developments and reintroduction of internal borders:

Young European Federalists (JEF Europe):

- JEF Europe is an organisation with 30,000 members promoting a federal Europe.
- JEF works on Schengen on a policy level by issuing resolutions both on Schengen and free movement.
- JEF is against the reintroduction of borders, unless needed for specific reasons.
- Main campaign "[Don't touch my Schengen](#)":
The key goal was to reach out to young people and involve them around the topic. The online campaign was implemented through 'thunderclap' and reached out to 1.5 million people while the offline campaign took place in 25 cities.
- JEF sent a [letter](#) to the President of the European Council, Donald Tusk, and received an email of support for the campaign. The President of the European Parliament, Martin Schulz, and President of the European Commission, Jean-Claude Juncker, have also reacted positively to the initiative.

Milieu:

- Milieu is a multi-disciplinary consultancy based in Brussels.

- Milieu has published several studies: Study on free movement of workers, FRA studies on border management, study on obstacles of free movement for families, etc.
- Milieu has been also analysing Schengen from the point of view of consumer law. [The European Commission has been highlighting the importance of the shared economy and encouraging deregulation in order to foster more peer-to-peer transactions. Schengen is necessary for this shared economy so it is important to take into consideration the consumers perspectives.]
- Regarding the migration crisis, it is important to reinforce the external borders in order to enjoy fully free movement internally.

AEGEE:

- AEGEE is a student organisation, striving for a democratic, diverse and borderless Europe. It has been working on free movement of persons since its launch.
- AEGEE was amongst the first promoters of the creation of the Erasmus project.
- AEGEE was the first to open up to Eastern Europe and has been addressing issues regarding visas.
- AEGEE has issued policy papers regarding migration and the freedom of movement, mainly on how these issues have impacted the lives of young Europeans.
- AEGEE also does advocacy work and implements projects around these topics.
- AEGEE notices that the problems arising from this subject are mainly related to the lack of information and of knowledge on Schengen and on citizens (and human) rights.

ESN:

- ESN is a non-profit international student organisation, which works on international mobility of students.
- The recent issues regarding Schengen have not had an impact on Erasmus students.

ECAS:

- ECAS is a European association which helps citizens exercise their rights in the EU and has been actively supporting the free movement of citizens for more than 20 years.
- ECAS runs [Your Europe Advice](#) (YEA) - a service which provides tailor-made legal advice to more than 22,000 EU citizens annually who exercise their right of free movement in the EU and encounter difficulties. YEA has experienced a 9.4% increase in enquiries in 2015 compared to 2014, which is indicative of the growing number of problems associated with the practical implementation of the most cherished right by EU citizens. YEA is not a complaints mechanism, however, and does not register fundamental rights' violations.
- ECAS carries out advocacy activities at the EU level to support a better environment for EU citizenship rights.
- ECAS strongly feels a need for more campaigns which focus on preserving the balance between fundamental rights, freedom and security. (eg. The Passenger Name Records (PNR), issue shows how data can today be widely shared for the sake of 'security threats'). There is no clear definition of public security threats and this could lead to dangerous situations which Europe has already had to deal with in the past.
- ECAS has noticed how Member States are becoming more 'inventive' when jeopardising EU rights.

Personal experiences:

The participants took the opportunity to share their personal experiences regarding the Schengen situation. Some of them have noticed clear violations of human rights and privacy

in border controls while travelling. For example, it is unacceptable to see how people with a more 'southern' physical appearance are heavily interrogated by authorities at borders. Furthermore, the question is on how efficient the controls are, as in some countries it is relatively easy to avoid controls by simply taking side roads.

One participant highlighted that the main problem of the Schengen situation is the reinterpretation of certain articles of the legal framework which provide opportunities for political manoeuvres.

Several policy-makers stated that people in Europe are increasingly buying into nationalist agendas. However, the youth organisations at the stakeholder discussion are challenging this statement. The campaign 'Don't touch our Schengen' is a good example.

Communication and information are key factors. There is common concern on what kind of information citizens receive on the Schengen situation and the migration situation. Hence, the focus should be on ways to increase citizens' understanding of Schengen and of their rights as EU citizens (people do not understand their rights are being violated at border controls.)

Further analysis should focus on who is targeted by these border controls under the current situation. ECAS mentioned how the questions from citizens have increased in the last year under YEA. It could be interesting to examine the questions/cases and examine what has changed.

Part 2: Schengen Borders Code versus Dublin II Regulation

This session was on relations and distinctions between the Schengen Border Code and the Dublin II regulation. Specific remarks include:

- ECAS and ESN declared no position on this topic. They both deal with EU mobility rights more than migration issues.
- AEGEE explained how the Dublin framework does not help the migration situation since it is just a way to 'trap' refugees in some Member States to keep the problem away.
- JEF Europe is pushing EU institutions to reach a common asylum and migration policy in the EU.

General remarks:

- Civil Society Organisations (CSOs) agree that one big problem is the lack of information on the migration situation. Migration is badly perceived by the public because of the media, speeches by politicians with extremist views etc. Not only is it important for decision-makers to inform citizens in the right way about these people, but also one of the main duties of CSOs is to support the change of narrative on migration and counterbalance negative stereotypes.
- CSOs are concerned about the integration of migrants in our societies and highlighted the need to foster education and awareness-raising in particular. The challenge is two-fold: how to allow refugees to have access to the education system in Europe and, at the same time, how to educate European societies about refugees, tolerance etc.

- CSOs have highlighted that there is indirect support for refugees by the EU institutions more than direct support. For example, organisations working for refugees are being heavily funded by the EU, especially projects which involve the education of refugees on soft skills or hard skills.

Part 3: Role of CSOs in the evaluation of the implementation of the Schengen agreement – should civil society take a more active role in the institutional framework of the SEM or play an independent watchdog role?

CSOs think they should be both having a more active role in the SEM framework and having more of a watchdog and monitoring role. They proposed different ways to have a more active role on the Schengen agreement:

- CSOs could work on a joint request to access documents in order to understand why Schengen-related documents are treated under the confidentiality rules and to get access to the information concerning the fundamental rights of citizens.
- CSOs can request to participate in the [Frontex Consultative Committee](#).
- CSOs could enhance collaboration with the [European Union Agency for Fundamental Rights](#) (FRA)
- Media campaigns to inform citizens about Schengen.
- Creation of an online repository of relevant documents. This would facilitate access to information on the topic.
- Collaboration with the organisers of the [Schengen Watch](#), created by Jon Worth and supported by EMI, which is a collection of opinions/experiences by people at the borders.
- Project on free legal aid to migrants in a language they understand. Access to information is the second important need after humanitarian aid. There are a lot of legal clinics around Europe who could collaborate.
- CSOs could take part in monitoring the application of the Schengen *acquis*
[One of the participants referred to a good example of a civic monitoring project implemented in the period 2010-2011. The project consisted in assessing the progress of Bulgaria and Romania's preparation for joining the Schengen area, specifically on the implementation of the action plans of the two governments. The main objective was to push the governments to implement quality measures and inform citizens of both countries about the implementation of the *acquis*. Shadow civic reports were developed because the Minister of Interior in Bulgaria had agreed to be subject to monitoring and had granted CSOs access to information. Six independent CSO teams could assemble independent information with the primary goal of measuring implementation according to timeframe and objectives. More information: [Progress Reports on the Accession of Bulgaria and Romania towards the Schengen Area](#).

Concluding remarks

From the stakeholder discussion, the two main effects of the Schengen situation on citizens' mobility are:

1. The uncertainty of the impact on citizens' rights, in particular free movement.
2. The impact of the sharing of personal data as a tool to allegedly increase security (e.g. the impact of Passenger Name Records).

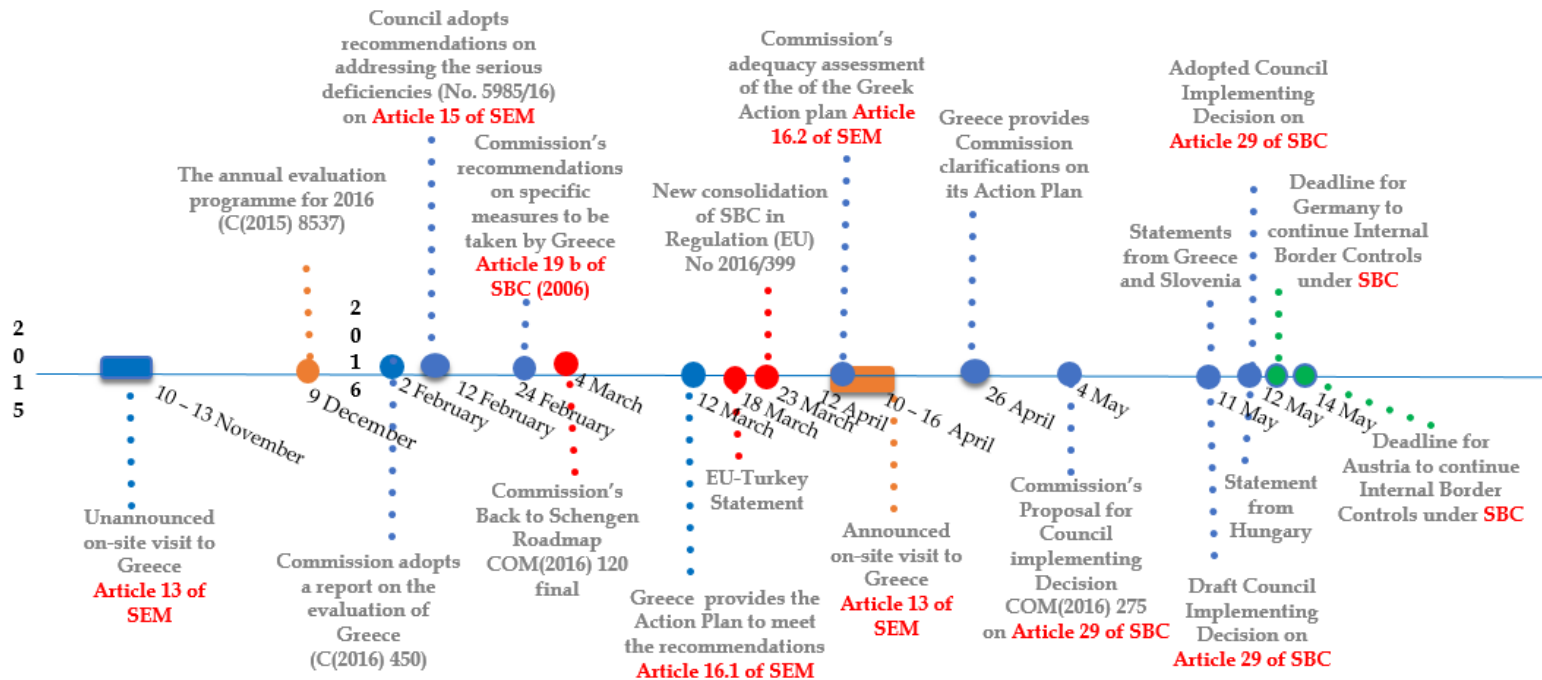
ANNEX: Stakeholder Discussion – List of Participants

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Vosyliūtė	Lina	Researcher	Centre for European Policy Studies (CEPS)

ANNEX 5. DEVELOPMENTS ON THE APPLICATION OF THE ARTICLE 29

The Schengen Border Code (SBC) application on invoking Article 29 SBC:

- Elements of Schengen Evaluation and Monitoring mechanism (SEM) following from unannounced visit on 10-13 November, 2015
- Elements of SEM following from announced visit on 10-16 April, 2016
- Elements outside of SEM
- Deadlines for the Member States to keep internal borders under the Articles 28+27 of SBC



Source: Authors

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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