

Preserving or Strengthening Schengen?

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While the multiple crises of recent years are slowly but surely giving way to a renewed optimism about the European project, one of the European Union's most symbolic and tangible achievements, the Schengen area, is not out of the danger zone yet. Rather, political pressures on maintaining a free movement area without internal border controls seem as high as they were at the height of the 2015 'refugee crisis'. Because of the sustained unwillingness of some member states to lift internal border controls, the EU's policies on Schengen are strongly dominated by intergovernmental interests, reviving memories of the system's early days outside the EU legal system. A new Commission proposal on modifying the Schengen Borders Code (SBC), presented with the subtitle "Preserving and Strengthening Schengen", appears to be more about *preserving* Schengen in the face of an antagonistic political climate rather than *strengthening* its essence, *i.e.*, an area without internal border controls.

An inauspicious autumn

The latest deadline for lifting internal border controls is approaching (11 November), but five countries have already signalled their intention to continue internal border checks after that date (Austria, Denmark, Germany, Norway and Sweden). To do so, they will have to shift the legal basis of these border controls (currently article 29 SBC), of which the time limit has been exhausted, to a different legal basis (articles 25-27 SBC). Critical questions can and have been raised on whether cumulating different legal grounds in this way does not reduce the SBC to a licence for near-permanent border controls.

At the same time, a new Commission proposal aimed at updating EU law on internal border controls already seems to be at odds with the preferences of Austria, Denmark, France, Germany, and Norway. According to a leaked non-paper from these countries, they envisage an extension of the current maximum duration for internal border controls from two to four years. The Commission proposal instead suggests extending the maximum time to three years.

These developments are the latest in what has been a series of back-and-forths between the Commission and member states over border controls since September 2015 when Germany, followed by Austria and several other countries, reintroduced internal border checks on account of "a massive and uncontrolled influx of third-country nationals" (German notification). These controls were repeatedly extended even after the number of migrant arrivals – and parallel secondary movements – dropped significantly following the closing of the Balkans route and the implementation of the EU-Turkey Statement.

The 2013 reforms

Tensions in 'Schengenland' are not new of course. A critical moment that is still fresh in mind is the 2011 Franco-Italian affair when France unilaterally reintroduced border checks fearing potentially large inflows of Tunisians via Italy. Italy had chosen to provide some of these Tunisians, coming to Europe in the wake of the Arab spring, with temporary residence permits allowing them to move freely in the Schengen zone. At the core of this affair, and much like today, were questions about member states' willingness to share responsibility and show solidarity in the context of high immigration pressures.

The incident led to a reform of the SBC in 2013. It introduced the possibility of reinstating internal border controls when "serious deficiencies to external border control (...) put the overall functioning of the area without internal border control at risk" (article 29). This new possibility aimed at preventing future unilateral actions such as those at issue in the Franco-Italian affair. The new leeway was counterbalanced with stronger necessity and proportionality requirements, and a strengthened control role for the Commission.

Arguably, things have not improved much since 2013. It is telling that just over four years since the last legal updates, a renewed need for legislative change is felt.

The Commission's proposal: preserving and strengthening Schengen

The Commission's new proposal follows the same balancing approach as the one taken in 2013. On the one hand, member states are granted new possibilities to reinstate internal border controls for longer periods of time, while on the other, tougher necessity and proportionality safeguards are introduced.

More specifically, changes to art. 25 and 27 of the SBC would extend the maximum duration of internal border controls when there is a "serious threat to public policy or internal security" from six months to a year. The period could be further prolonged by an additional two years culminating in a new three-year maximum. Art. 29, with its separate two-year limit in the event of "serious deficiencies relating to external border control" would remain unmodified.

In return, member states would have to comply with stricter reporting requirements. Amongst others, they would have to provide a retrospective assessment of how previous border checks contributed to remedying the identified threat prior to prolonging them.

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Continuing the same balancing approach is unlikely to provide the best way forward. As the rollout of the 2013 amendments has shown, when faced with strong political pressure, the balance between extending border controls and strengthening proportionality checks, easily gives rise to a dominance of the former over the latter. Arguably, there would have been scope over the past few years for a much stricter application of the proportionality controls already introduced in 2013. A look at the justifications that member states provided for reintroducing border controls since 2015 shows that these rarely offered the level of detail required for earnestly assessing their proportionality and necessity. It is also striking that secondary movements of third-country nationals continued to be used as a justification, and accepted as such by the Commission, long after those numbers had dropped significantly.

Faced with strong political pressures, the Commission likely felt disinclined to make full use of its prerogatives. Rather than risking a public fallout over Schengen at EU level, which could structurally damage the framework, it sought to accommodate the wishes of those member states pushing for extended internal border controls.

The latest proposal follows this trend. In light of the fate of the 2013 proportionality checks, it is unlikely that introducing additional checks of the same kind will have any effect. That is, unless member states take up more responsibility and/or the Commission adopts a tougher stance. Neither seem probable for the foreseeable future. The current notifications of five member states to continue internal border controls past the 11 November deadline rather suggest the opposite. Instead, the proposal's effects will most likely amount to, depending also on the subsequent negotiations, providing member states with further scope to introduce such controls. In short, there is nothing new under the sun. The Commission's proposal comes across as the latest attempt at *preserving* Schengen by means of drawing up yet another EU legal frame around member states' actions, rather than *strengthening* Schengen as a free movement area without internal border controls.

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