

The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016

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CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

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STUDY

Abstract

This Study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Civil Liberties, Justice and Home Affairs (LIBE-Committee), takes stock of the main developments that have occurred in the Schengen Governance Framework since 2016. It analyses the legitimacy of a number of States' decisions to maintain internal border controls. Also, most recent policy proposals in the field of internal police checks are assessed in light of relevant EU legal standards. The paper also questions the legality of the border walls and fences, which have been recently erected at the EU external borders and within the Schengen area.

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EXECUTIVE SUMMARY

- **The European Commission's strategy of using Article 29 of the Schengen Borders Code (SBC) to reduce internal border controls and gradually return to a Schengen area free of internal borders has not prevented controls from continuing.** Each time the Council has "re-triggered" Article 29(2) SBC all five Member States have followed the "recommendation" and maintained their internal border controls adducing that the "persistence" of "an important number of irregular migrants still [remaining] in Greece" continues to seriously threaten public policy and internal security and continues to put at risk the overall functioning of the Schengen area.
- **The reasons that EU Member States use to justify the reintroduction or prolongation of temporary internal border controls still reflect crisis-mode policy-making on migration, asylum and borders.** The legal difficulty of justifying the reintroduction internal border controls under Article 25 SBC on the basis of the "migratory crisis" has not dissuaded Schengen States from invoking the persistence of a "serious threat to public policy and internal security" when notifying the prolongation of internal border controls. Some of the notifications have explicitly linked the (secondary) movements of irregular migrants to terrorism. In some cases, (e.g. France), **it is questionable whether sufficiently distinct factual circumstances actually justified a new period of temporary internal border controls under Article 25 SBC.**
- **The European Commission has explicitly stated that the "migratory crisis and secondary movement" can no longer be invoked to justify or prolong internal border controls.** No publicly available information is available on whether the Commission has, to date, examined the compatibility of the most recent Schengen States' notifications with the Schengen Borders Code. However, recent exchanges between the "affected" Schengen States (e.g. Germany) and the Commission suggest that the latter is actively attempting at limiting the spaces and intensity of internal border controls which have been reintroduced (prolonged) by some Schengen States on the basis of Article 25 SCB.
- **The Court of Justice of the European Union (CJEU) recently established a set of benchmarks on the basis of which the lawfulness of the national legal framework police checks can be assessed.** National law on police checks must be sufficiently clear and precise, provide limitations to the intensity and frequency of the checks and limit the discretion of police authorities. Also, as expressly stipulated in Article 2.10 of the SBC, the objectives of police checks must be different from 'border controls'. Furthermore, the CJEU established that the national frameworks on police checks are subject to incremental legal certainty requirements. These requirements are in fact stricter whereas is evidence that police checks conducted by Member States authorities have equivalent effect to border checks.
- **The proportionality test of national police checks is in hands of the Commission and has been 'Europeanised' within the Schengen governance framework.** However, to date the collection of precise statistics is needed to verify the extent to which current police checks in Member States are necessary, proportionate and justified, and implemented in line with the standards provided by the CJEU.
- **The EU has recently witnessed a 'domino effect' in the construction of external and internal border walls and fences which different Member States built with the aim of diverting or preventing asylum applicants from reaching and transiting through the EU.** These practices are not envisaged under the Schengen governance mechanism and serious doubts exist as to their compatibility with the SBC

(Article 14) and the EU Charter of Fundamental Rights, in particular the right to asylum (Article 18).

- **The construction of border fences challenges the very premises of the Schengen Agreement, namely the 'spirit of Schengen' which relies on mutual trust and loyal and sincere cooperation.** Resorting to such national measures in light of the so-called refugee crisis has in practice meant passing the responsibility for asylum seekers to other Schengen States, pre-accession states and third countries which are already hosting large numbers of international protection seekers.
- **It is unclear to what extent the Commission's proposal for extending the time periods of internal border controls is necessary and provides an added value.** Furthermore, though the additional safeguards proposed by the Commission are a step in the right direction, **it is highly problematic that the reintroduction of internal border controls would be based on an assessment of "perceived risk" (instead of rigorous and sound evidence of the actual existence of a serious threat).** The proposed "risk assessment" is also problematic, as it is entirely placed in the hands of the state that is reintroducing border controls.
- **Decision to introduce or reintroduce internal border checks relies too heavily on Member States' Risk Assessment. On the other hand, the scope for a formalised operability of the Schengen Evaluation Mechanism is still limited in this context.** The systematic operationalisation of the Schengen Evaluation Mechanism would allow for the decision to introduce or reintroduce internal border checks to be taken upon on robust and solid evidence of the actual existence of any threat or challenge.
- **The European Integrate Border Management (EIBM) system does not seem to replace the old intergovernmental and non-integrated model of border control and surveillance.** However, the fact that the EIBM concept is now enshrined in the EU Treaties means that the ways in which the European Border and Coast Guard will implement the various EIBM components must take due regards to the EU borders and asylum *acquis*, as well as the EU Charter of Fundamental Rights.
- **Different accountability regimes and related oversight systems apply to the border and coast guards that, on a case by case basis, participate in an operational activity developed under the EIBM framework.** The different types of complaint procedures and remedies that are available to individuals affected by border control, border surveillance or return activities varies depending on the specific authority to which the agent that adopted the action or decision leading to an abuse is affiliated to, and on the type of mission and/or framework of cooperation within which the action or decision leading to a fundamental right infringement was adopted.
- **Accountability issues further arise from third-country authorities' participation in the EIBM framework. The exact role and actual responsibilities of foreign authorities acting *de facto* as EIBM agents remain to a large extent unclear.** By granting third-country authorities an increased operational role, the Union and the Member States are attempting to escape the legal responsibility that would apply for abuses committed against asylum seekers and immigrants falling under their jurisdiction.
- **The increasing interconnections and 'interoperability' of existing EU large scale-data bases results in a "blurring of boundaries" between different EU policies ranging from immigration to criminal justice and police cooperation, from foreign and security policy to defence. However, the law enforcement and security authorities' use of the information contained in databases which were primarily designed as instruments for border management and migration control poses significant challenges to fundamental rights enshrined in the EU**

Charter, and in particular to the right to privacy, data protection and non-discrimination.

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1. INTRODUCTION

What is the state of play of the Schengen system? And is it crisis-proof? **This paper constitutes a follow-up to a previous Study titled "Internal border controls in the Schengen area: Is Schengen crisis-proof?"**¹ which was completed in June 2016, at a time when Article 29 of the Schengen Borders Code (SBC) had just been activated by the Council² and the European Commission's "Back to Schengen" Roadmap was still in its initial phases (see Annex 1 for an updated overview of the developments covered in the initial Study).

The Commission's Roadmap foresaw "bringing to an end the exceptional safeguard measures" by the end of December 2016³ and Article 29 was one of the main innovations of the SBC. It was included as a 'nuclear' procedure allowing for the prolongation of internal border controls up to two years. Such prolongation is allowed when the Schengen Evaluation Mechanism (SEM) shows that "serious deficiencies" exist at the Schengen area's external borders. This update investigates why internal border controls have been introduced by several EU Member States outside of the procedure established by Article 29 SBC and why prolongations have exceeded all the limits foreseen by the SBC. This paper scrutinises the extent to which innovations introduced by the 'Back to Schengen' Roadmap have effectively addressed Member States' 'fears of secondary movements' by asylum seekers. It questions whether these 'fears' could have been better dealt under the current Schengen governance framework and Common European Asylum System (CEAS).

The 2016 Study analysed key policy developments that followed the Schengen Evaluation and Monitoring Mechanism's (SEM) unannounced missions to the Greek islands in 2015 (i.e. at the peak of the EU refugee crisis).⁴ At the time, Greece could not refuse to admit asylum seekers without placing itself in breach of the 1951 UN Geneva Refugee Convention and its 1967 Protocol, the EU Treaties and the EU Charter of Fundamental Rights as well as EU secondary legislation composing the CEAS. The study found that, as a follow-up to the visit to the Greek islands, several Schengen States became concerned with the security challenges that were associated with the Greek authorities' difficulties in implementing external border controls. This, however, went to the detriment of investing in the improvement of Greece's reception conditions and the enhancement of the Greek authorities' capacity to process asylum claims.

The Study found that the EU and its Member States reacted to refugee arrivals not via the CEAS, but through the reintroduction of internal borders, a move designed to regulate movements of third-country nationals seeking international protection. This regardless of the provision contained in Article 14.1 of the SBC, which stipulates that 'normal borders procedure' is not applicable to asylum seekers (emphasis added):

A third-country national who does not fulfil all the entry conditions ... shall be refused entry to the territories of the Member States. *This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.*⁵

Although these people were within the Schengen area, they were not allowed to move on rapidly to seek asylum in Member States with properly-functioning asylum systems. Instead, an extraordinary series of ad hoc responses (e.g. the closure of the so-called Balkan Route) came into place. This led the Schengen border-free space to become a victim of a non-functioning Common European Asylum System and in particular of the EU Dublin regime,

¹ Guild et al. (2016) Study for the European Parliament, PE 571.356 "Internal border controls in the Schengen area: Is Schengen crisis-proof?", Brussels.

² Council (2016), *Council Implementing Decision setting out a Recommendation for temporary internal border control in an exceptional circumstances*, 8835/16, 12 May 2016.

³ European Commission (2016), *Communication from the Commission to the European Parliament, the European Council and the Council, Back to Schengen - A roadmap*, COM(2016) 120 final, Brussels, 4.3.2016.

⁴ Guild et al. (2016) Study for the European Parliament, PE 571.356 "Internal border controls in the Schengen area: Is Schengen crisis-proof?", Brussels.

⁵ The issue is further clarified in Annex VI of the SCBC, where international protection is reiterated as a first principle to be respected for both shared border crossings between EU Member States and between EU Member States and third countries. This Annex emphasizes that: "...a third-country national who has passed exit control by third-country border guards and subsequently asks Member State border guards present in the third country for international protection, *shall be given access to relevant Member State procedures in accordance with Union asylum acquis* ..."

which currently applies an unfair and non-solidarity-based model of distributing responsibility for assessing asylum applications among EU Member States.

A majority of the EU Member States currently conducting internal border checks within the Schengen area have officially justified such measures on the basis of “fears of secondary movements” of asylum seekers. These asylum seekers have been often and wrongly re-labelled as ‘irregular immigrants’. As a consequence, their right to seek asylum under the EU asylum *acquis* standards has often been undermined. As the European Commission highlighted in its assessments of Greece,

[T]he identification and registration procedure and *appropriate reception conditions* are indispensable, given the subsequent *secondary movements* to other Member States which put the functioning of the whole Schengen area at risk and which has led several Member States to *temporarily reintroduce border controls at their internal borders*.⁶

Since the unfolding of the so-called EU refugee crisis, five Schengen zone Member States, namely Austria, Denmark, Germany, Sweden and Norway have introduced and repeatedly prolonged internal border controls citing fear of ‘secondary movements’ of asylum seekers. In March 2016, the European Commission’s “Back to Schengen” Roadmap presented a timeline which was supposed to address the concerns of these Member States, namely (emphasis added):⁷

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*.⁸

The plan was initially committed to get back to the ‘full’ application of Schengen *acquis* by September 2017. This Paper provides a detailed examination of the measures undertaken at the EU and national levels to achieve this goal. It does so while considering that the concerned Member States’ decisions to maintain internal border checks currently persist, despite all the envisaged time limits established in Article 29 SBC having expired (Section 2 of this Paper).

In the meantime, **decisions to introduce and endure internal police checks which may amount to border controls have ended up before the Court of Justice of the European Union (CJEU).** This Paper scrutinises the standards developed by the Court of Luxembourg to assess the compliance of EU Member States’ ‘spot checks’ practices at internal borders, in particular when these checks are applied in the absence of the (formal) temporary reintroduction of border controls (Section 3). Furthermore, the EU has recently witnessed the erection of external and internal border walls and fences which different Member States have built with the aim of diverting or preventing asylum applicants from reaching and transiting through the EU. As this Paper shows, these practices are not envisaged under the Schengen governance mechanism, and serious doubts exist as to their compatibility with the SBC and the EU Charter of Fundamental Rights (Section 4).

One of the most important policy developments which has occurred since the previous Study was published is the new Commission’s proposal on the temporary reintroduction of internal border controls. In parallel, the European Commission has issued a set of recommendations to gradually resume Dublin transfers to Greece from 15 March 2017.⁹ According to these recommendations, asylum applicants who entered the EU ‘irregularly’ via Greece after 15 March 2017 and asked for asylum in another EU Member State could be transferred back

⁶ 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., p.4.

⁷ European Commission (2016), *Back to Schengen - A roadmap*, COM(2016) 120, Op. cit.

⁸ 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.

⁹ European Commission (2017) Recommendation of 8.12.2016 addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No. 604/2013, C(2016) 8525 final, Brussels, 8.12.2016.

following the Dublin III Regulation. The Briefing Paper analyses the content and implications of both initiatives (Section 5).

The Briefing Paper also looks at another key initiative adopted by the EU in response to the 'refugee crisis', namely the European Border and Coast Guard (EBCG or Frontex) which has become operation in September 2017. **The new Frontex agency has been entrusted with an extended operational and strategic mandate, including the power to conduct 'vulnerability assessments' linked with the Schengen Evaluation and Monitoring Mechanism.** The Briefing Paper investigates the increasingly important role attributed to the EBCG under the European Integrated Border Management concept (Section 6). Specific attention is paid to the concerns that the key EIBM components, in particular enhanced cooperation with third countries and the interoperability of existing large-scale information systems, raise for fundamental rights and the rule of law. Section 7 draws conclusions on the basis of this analysis and makes some innovative policy recommendations.

2. INTERNAL BORDER CONTROLS

Since mid-2016, a total of ten Schengen States have reintroduced (or prolonged) temporary internal border controls in their territories on the basis of the Schengen Borders Code for various reasons. This Section examines the justifications provided in their notifications for the reintroductions of temporary internal border controls. It provides a summary of the findings presented in **Annex 3 of this Study** which provides an updated and detailed overview of the grounds, justifications, timeframe and legal basis used by each of these states in their reintroduction of internal border checks.

2.1. Temporary reintroduction of border controls as a reaction to the refugee humanitarian crisis: the Council Implementing Decisions

The Council adopted on 12 May 2016, based on a proposal from the Commission,¹⁰ an Implementing Decision “setting out a Recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk”.¹¹ The Implementing Decision was adopted on the basis of Article 29(2) of the Schengen Borders Code (SBC). The factual basis underpinning the Council Implementing Decisions was the “unprecedented migratory and refugee crisis [the EU is facing] following a sharp increase of mixed migratory flows since 2015”, leading to “serious deficiencies” in external border controls “resulting in important secondary movements, causing a serious threat to public policy or internal security” and “putting at risk the overall functioning of the area without internal border control”.¹²

The triggering of Article 29(2) SBC by the Council meant in essence that the five Member States concerned, i.e. Austria, Germany, Denmark, Sweden and Norway, were permitted to retain their temporary internal border controls for an additional period of up to six months (i.e. up to 12 November 2016). In their notifications, all five Member States have stated their intention to “comply” with the Council’s Implementing Decision (see Figure 1 below). The territorial scope and the types of border controls permitted pursuant to the Council Implementing Decision were:

- Austria at the Austrian-Hungarian land border and Austrian-Slovenian land border;
- Germany at the German-Austrian land border;
- Denmark in 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; and
- Norway in the Norwegian ports with ferry connections to Denmark, Germany and Sweden.

In short, the permitted scope of temporary internal border controls enumerated above amounted to the Council allowing Austria, Denmark, Germany, Norway and Sweden to maintain their existing temporary internal border controls. The previous study considered that “there seems to be a containment policy at work, which will gradually squeeze the space for controls down to nothing”.¹³ **This strategy of squeezing the spaces of controls has however not prevented the controls from continuing.** The Council has subsequently “re-triggered” Article 29(2) SBC three times, for periods of three months and six months.¹⁴ Each

¹⁰ 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.

¹¹ Council of the EU (2016), Council Implementing Decision (EU) 2016/894 of 12 May 2016 setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, OJ L 151, 8.6.2016, pp. 8-11.

¹² Council of the EU (2016), Council Implementing Decision (EU) 2016/894, op cit., recitals 1, 10-11, 15

¹³ Guild et al. (2016), op. cit., p. 54.

¹⁴ Council of the EU (2016), *Council Implementing Decision (EU) 2016/1989 of 11 November 2016 setting out a recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall*

time, all five Member States have followed the Council's "recommendation" and maintained their internal border controls. Neither the territorial scope nor the types of internal border controls have differed between the four Article 29 SBC-based Council Implementing Decisions. It is surprising to note the justification for the continued maintenance of the temporary reintroduced internal border controls. All three subsequent Council Implementing Decisions note, in the recitals that despite the reduced migratory flows and the progress made by Greece in external border management, the "persistence" of "an important number of irregular migrants still [remaining] in Greece" continues to seriously threaten public policy and internal security and continues to put at risk the overall functioning of the Schengen area.

Temporary reintroduction of internal border controls on the basis of Article 29 SBC is limited to periods of up to six months, and the total period of temporary internal border controls may not exceed two years (Article 29(1) and (2) SBC). Furthermore, Article 29 SBC may only be invoked for a maximum of four times (in other words, the period may be prolonged no more than three times). **With Council Implementing Decision (EU) 2017/818, the maximum number of prolongations was reached, entailing the end of the Article 29 SBC-based temporary internal border controls** resulting from the "migratory crisis and consequent secondary movements of irregular migrants". The Commission has also recognised that the Article 29 SBC-procedure can no longer be invoked in these circumstances in its Communication "on preserving and strengthening Schengen" of 27 September 2017, noting in particular that "[t]he latest reports from the Schengen States under the third and last prolongation confirm the steady trend that the overall situation has greatly improved since the beginning of the migratory crisis".¹⁵

In the "Questions & Answers" accompanying the Commission's Press Release on "Preserving and strengthening Schengen to improve security and safeguard Europe's freedoms" on 27 September 2017,¹⁶ the Commission notes specifically (emphasis added):

At the expiry of the current internal border controls in November, following the third and final prolongation legally possible authorised by the Council for Austria, Germany, Denmark, Sweden and Norway (pursuant to Article 29 of the Schengen Borders Code) in May this year, the exceptional circumstances resulting from the context of the unprecedented migratory and refugee crisis which started in 2015, **the deficiencies in the external border management by Greece and the secondary movements resulting from these deficiencies can no longer be invoked to justify reintroduction or prolongation of internal border controls**].¹⁷

As it will be seen below, **this has not precluded Austria, Denmark, Germany, Norway and Sweden from prolonging temporary internal border controls on this exact same factual basis.**

2.2. Temporary reintroduction of border controls as a reaction to the refugee crisis: post-Council Implementing Decisions

The fact that the Commission (and the Council) may no longer invoke Article 29 SBC has meant that the "affected" Schengen States intending to prolong (or "temporarily reintroduce") internal border controls have attempted to seek solace in the remaining procedures of the SBC (e.g. Article 25 SBC). **It is highly questionable whether Schengen States would be permitted to prolong their internal border controls under Article 25 SBC on the**

functioning of the Schengen area at risk, OJ L 306, 15.11.2016, p. 13–15; Council of the EU (2017), *Council Implementing Decision (EU) 2017/246 of 7 February 2017 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk*, OJ L 36, 11.2.2017, p. 59–61; Council of the EU (2017), *Council Implementing Decision (EU) 2017/818 of 11 May 2017 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk*, OJ L 122, 13.5.2017, p. 73–75.

¹⁵ Commission (2017), *Communication from the Commission to the European Parliament and the Council on preserving and strengthening Schengen*, COM(2017) 570 final, 27.9.2017, p. 4.

¹⁶ Commission (2017), "State of the Union 2017 - Preserving and strengthening Schengen to improve security and safeguard Europe's freedoms", European Commission – Press release IP/17/3407.

¹⁷ Commission (2017), "Questions & Answers: Preserving and strengthening the Schengen area", European Commission – Fact Sheet MEMO/17/3408.

same factual basis (namely the “migratory crisis and resulting secondary movement of undocumented and irregular migrants”). As noted, the European Commission has stressed that the “migratory crisis” may no longer be used as a justification for retaining internal border controls under the SBC.¹⁸

This has not, apparently, dissuaded the “affected” Schengen States (i.e. Austria, Denmark, Germany, Norway and Sweden) from invoking Article 25 SBC in order to further prolong their internal border controls. Despite the wording of the notifications as “temporary reintroductions”, **it is clear that the intention of these States is to prolong the internal border controls resulting from the perceived threat of “secondary movement of irregular migrants”**. This is clear as all five Schengen States seem to lament the lack of possibility for the prolongation of Article 29 SBC, noting the persistence of the “serious threat to public policy and internal security” resulting from the “serious deficiencies in the external border management”. As an example, the Austrian notification refers solely to the circumstances which underpinned the four Council Implementing Decisions on the basis of Article 29 SBC.¹⁹ Germany similarly considers the persisting “deficiencies” in the external border controls and secondary irregular movements as justifying their prolongation (“temporary reintroduction”) of internal border controls.²⁰

Seemingly to circumvent this incompatibility, **some of the notifications have notably explicitly linked the (secondary) movements of irregular migrants to terrorism**. Denmark, for example, notes that “the large number of irregular migrants and failed asylum seekers present in our neighbouring countries that are waiting to be returned to their country of origin or transit poses a real security threat, as *there is a risk that some terrorist group will exploit their vulnerable situation*” (emphasis added).²¹ Sweden, in lamenting the end of the Article 29 SBC-based prolongation, notes that the “shortcomings in the protection of the external borders persist and contribute to this threat, as *they enable potential terrorists and other criminals to enter the Schengen territory unnoticed*”.²² Norway considers that the “shortcomings in the protection of the external borders and significant irregular secondary migration within the Schengen area ... creates serious threats to public security and order, with a risk of persons suspected of having terrorist intentions posing as refugees”.²³

Concerning the period of “temporary reintroduction”/prolongation of the internal borders, all of the aforementioned Schengen States except Germany have opted for the maximum *total* period permitted under Article 25 SBC, i.e. six months (see Figure 1 below).²⁴ **Little to no attention is given in the notifications to the reason why, in accordance with Article 25 SBC, these Schengen States consider that the “foreseeable duration of the**

¹⁸ Ibid.

¹⁹ Austrian Delegation (2017), *Prolongation of the temporary reintroduction of border controls at the Austrian internal borders in accordance with Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, Brussels, Council Document 13207/17, 13.10.2017.

²⁰ German Delegation (2017a), *Prolongation of the temporary reintroduction of border controls at the German internal borders in accordance with Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, Brussels, Council Document 13142/17, 12.10.2017.

²¹ Danish Delegation (2017), *Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 25 and 27 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, Brussels, Council Document 13141/17, 12.10.2017.

²² Swedish Delegation (2017), *Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 25 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, Brussels, Council Document 13203/17, 13.10.2017.

²³ Norwegian Delegation (2017), *Prolongation of the temporary reintroduction of border controls at the Norwegian internal borders in accordance with Articles 25 and 27 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, Brussels, Council Document 13205/17, 13.10.2017.

²⁴ Germany originally also notified its intention to temporarily introduce/prolong internal border controls for a period of six months (see German Delegation (2017a), Council Document 13141/17, op. cit.). In a subsequent notification on 11 December 2017, Germany notified of its intention, for the same reasons, “reintroduce border controls for a limited period of up to 30 days and prolong them for renewable periods of up to 30 days within a period not exceeding six months” (see German Delegation (2017b), *Prolongation of the temporary reintroduction of border controls at the German internal borders in accordance with Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, Brussels, Council Document 15828/17, 15.12.2017).

serious threat” exceeds 30 days. In line with the Schengen framework, this entails that all five States will retain internal border controls until **May 2018**.

It is questionable, however, whether May 2018 will truly see the removal of internal borders in these states. In a “non-paper” on 5 September 2017, Austria, Denmark, France, Germany and Norway call on the Commission to propose amendments to the SBC, extending the periods of temporary internal border controls under Article 25 SBC to three months *each*, with a total period of up to four years.²⁵ This call seems to have been picked up by the Commission, as it submitted a proposal for the amendment of the Articles 25 and 27 SBC in order to provide for (slight) amendment to the permissible periods of temporary reintroduction/prolongation of internal border controls (See Section 5 below).²⁶

There is no public information available on whether the European Commission has, to date, examined the *compatibility* of these Schengen States’ notifications with the Schengen Borders Code, particularly in light of its own position that the “migratory crisis and secondary movement” can no longer be invoked to justify or prolong internal border controls.

A letter from the German government dated 26 January 2018 seems to indicate that some form of informal exchange has taken place between the European Commission and Germany. The document refers to a letter from the European Commission dated 22 December 2017, and passages in this document seem to imply that a certain degree of scrutiny and follow up may have been exercised by the Commission regarding the scope and legality of the current German measures, including passages such as (emphases added):

- **“Given their lower intensity and smaller scope**, they are different from comprehensive checks at the external borders in accordance with Article 8 Schengen Borders Code.”
- “For example, since 12 December we have further modified the intensity of internal border controls with regard to air carriers from Greece operating flights to the federal territory. **For instance, flights checked already at the airport of departure in Greece are no longer fully checked upon arrival at a German airport. Instead, the border police carries out only random controls.** This significantly reduces interference with cross-border passenger traffic while meeting security needs.”
- “Being aware of the significance of temporary internal border controls in a common area where there are usually no internal border controls, **I would like to state that it is currently necessary to carry out such controls from a national point of view.** Furthermore, I would like to emphasize that, **despite the number of complaints**, there is no substantiated evidence that internal border controls are carried out in a disproportionate manner at Germany’s air and land borders. Carrying out temporary internal border controls in a national threat situation **is an integral part of the Member States’ national sovereignty and should not be undermined by excessive reporting requirements.**”

The emphasised sentences seem to indicate a response to comments made in the European Commission’s letter dated 22 December 2017. They reveal that the squeezing strategy by the Commission to limit the spaces and intensity of controls is still being effectively pursued. Also noteworthy is the reference in the German letter to “the number of complaints” which seem to have been lodged against the German internal border controls.

²⁵ *n.n.* (2017), “Non-paper from Austria, Denmark, France, Germany and Norway: Proposal for a targeted amendment to Article 25 of the Schengen Borders Code concerning the re-establishment of internal border controls”, 5 September, available at <http://www.statewatch.org/news/2017/oct/eu-schengen-internal-border-controls-proposal-at-dk-fr-de-no.pdf>.

²⁶ Commission (2017), *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders*, Brussels, COM(2017) 571 final, 27.9.2017.

2.3. Temporary reintroduction of border controls: France

Since its first notification on 15 October 2015, France has continuously maintained (temporarily reintroduced) internal border controls (see Figure 2 below). The scope of these internal border controls has remained consistent throughout, broadly covering all French air and sea borders and French land borders with its European neighbours. The first notification on 15 October 2015 covered the period of 13 November to 13 December 2015 and was justified on the basis of the COP21 UN climate change conference taking place in Paris.²⁷ The subsequent terrorist attacks in France in 2015, 2016 and 2017 and the declaration (and extensions) of the French state of emergency have formed the basis of nearly all French notifications of reintroducing or prolonging internal border controls (see Figure 2 below).

In all of these cases, the French government relied on the provisions of Article 25 SBC (and previously on Article 23 SBC of 2006). A question arising concerning the French temporary internal border controls is whether this has occurred in accordance with Article 25 SBC. Starting from the French notification following the Paris terrorist attack on 13 November 2015,²⁸ Article 25 SBC (former Article 23) would have permitted maintaining temporary internal border controls from November 2015 until May 2016 (i.e. six months). The French government could not therefore rely on the events of the Paris terrorist attack in 2015 to justify a prolongation beyond May 2016. Whether coincidental or intentional, the following period of temporary internal border controls from 27 May to 26 July 2016 was based on France hosting the UEFA Euro 2016 and the 2016 Tour de France.²⁹

The terrorist attack in Nice on 14 July 2016 precipitated a new period of the state of emergency in France (lasting up to 31 October 2017). Following these events, the French government notified its intention to "temporarily reintroduce" internal border controls, first from 27 July 2016 to 26 January 2017 (i.e. the maximum period of six months permissible under Article 25 SBC).³⁰ Subsequent French notifications "prolonged" this period of internal border controls to 15 July 2017 and 31 October 2017 respectively,³¹ each coinciding with the extension of the state of emergency in France. It is particularly the notification of 26 December 2016 (concerning the internal border controls from 27 January to 15 July 2017) which is concerning. **The only difference in factual circumstances between the French notification of 25 July and 26 December 2016 is the extension of the state of emergency in France. It is questionable whether there were sufficiently distinct factual circumstances posing "a serious threat to public policy or internal security" which would justify a new period of temporary internal border controls ex Article 25 SBC** (see Figure 2 below).

²⁷ French Delegation (2015), *Temporary reintroduction of border controls at the French 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 borders (Schengen Borders Code)*, Brussels, Council Document 13171/15, 22.10.2015.

²⁸ French Delegation (2015), *Temporary reintroduction of border controls at the French 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 borders (Schengen Borders Code)*, Brussels, Council Document 15181/1/15 REV 1, 15.12.2015.

²⁹ French Delegation (2016), *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)*, Brussels, Council Document 9506/16, 27.5.2016.

³⁰ French Delegation (2016), *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)*, Brussels, Council Document 11514/16, 27.7.2016. Of note is the link claimed by the French government between terrorism and migratory movements, as the notification refers to "[t]he current migratory situation reinforces the link between the terrorist threat and the crossing of borders. In fact, the volume of flows at the EU's external borders and the geographical proximity of migratory routes to the regions at the source of the terrorist threat facilitate the arrival in the Schengen area and national territory of individuals ... who might be plotting a terrorist attack in France" (emphases added). A similar reference to the link between migration and terrorism is invoked in the French notification of 26 December 2016 (see French Delegation (2017), *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)*, Brussels, Council Document 5055/17, 10.1.2017).

³¹ See French Delegation (2017), Council Document 5055/17, op. cit. and French Delegation (2017), *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)*, Brussels, Council Document 10365/17, 21.6.2017 respectively.

Similarly, reference can be made to the French notifications of 16 June and 3 October 2017, which “reintroduced” temporary internal border controls from 16 July to 31 October 2017 and 1 November 2017 to 30 April 2018 respectively. Assuming that the terrorist attacks in France in 2017 merit a ‘novel situation’ of threat justifying the temporary reintroduction of internal border controls on 16 July 2017, the October 2017 French notification seems to be based on (nearly identical) factual circumstances, with the principal difference being the “end” of the state of emergency in France on 31 October 2017 and the subsequent adoption of the French law on internal security and the fight against terrorism. **It is inconceivable how changes in the French legal *acquis* could be considered as sufficient to permit temporary internal border controls extending past the six-month limit stipulated in Article 25 SBC.**

The compatibility of the French reintroduction of internal border controls has been the subject of a ruling of the Council of State (*Conseil d’État*) on 28 December 2017.³² The case was presented by the *Association Nationale d’Assistance aux Frontières pour les étrangers et autres* (including GISTI and Cimade) asking the Council of State to annul the French Government’s decision to prolong the reintroduction of internal border checks between 1 November 2017 and April 2018.³³

When assessing the legality of the latest written notification by France, the Council of State recognises that since 13 November 2015 the French Government has asked nine times for a prolongation of internal border controls, which has never exceeded six months. It concludes that in light of evidence provided by the Government concerning the “high level of terrorist threat in France” this renewed threat constitutes a ground justifying a new application of Article 25 SBC because of “the foreseeable duration of the serious threat if its duration exceeds 30 days” (para. 8 of the Decision). Part of the French Council of State’s ruling considered whether the French internal border control reintroductions complied with the duration limits imposed in Article 25 SBC. The Council of State, referring to the Commission Recommendation C(2017) 6560, considered that

D’autre part, si l’article 25 précité limite la durée maximale de la réintroduction d’un contrôle aux frontières intérieures à six mois, il ne fait pas obstacle, en cas de nouvelle menace ou *de menace renouvelée* pour l’ordre public ou la sécurité intérieure, à la mise en place à nouveau d’un contrôle aux frontières pour une autre période d’une durée maximale de 6 mois ... [emphasis added]³⁴

However, this reading is directly incompatible with the current version of Article 25 SBC, which only applies to “new threats”, and cannot be applied to “renewed ones” (where Article 25(2) SBC would apply). This (mis)interpretation by the Council of State of the limitative nature of the Article 25-SBC period of six months has been criticised by a number of academics, including professors Paul Cassia and Sébastien Platon.³⁵ As noted by Platon, the reasoning of the Council of State is troubling for two reasons, as 1) “**the recommendation in question is not binding**, and therefore cannot be used as a ground for a legal reasoning”, and 2) “**the Council of State misquotes the recommendation in question.** ... The reasoning of the Council of State is therefore extremely misleading when it extends this possibility to situation of a renewed threat to public policy or internal security. Indeed, **the threat invoked by the Government is not new in nature.** It is merely the continuation of the threat that justified the initial reintroduction of border control back in 2015”.³⁶

³² Conseil d’État 28 December 2017, *Associations nationale d’assistance aux frontières pour les étrangers et autres*, Case No. 415291, available at <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/Conseil-d-Etat-28-decembre-2017-Association-nationale-d-assistance-aux-frontieres-pour-les-etrangers-et-autres>.

³³ Ibid, para. 1.

³⁴ Ibid, para. 7.

³⁵ See Cassia, P. (2017), “Le Conseil d’État decode Schengen”, 29 December, <https://blogs.mediapart.fr/paul-cassia/blog/291217/le-conseil-d-etat-decode-schengen>; Platon, S. (2018), “30 days, six months... forever? Border control and the French Council of State”, *Verfassungsblog on matters constitutional*, 9 January, <https://verfassungsblog.de/30-days-six-months-forever-border-control-and-the-french-council-of-state/>.

³⁶ Platon (2018), op. cit.

The Council of State further concluded that the French measures only affect the principle of free movement of persons in a manner which is proportionate to the public policy goal pursued; moreover, it also held that the decision does not have as an objective or in effect a violation of the right to asylum. It therefore decided not to refer the question before the CJEU in Luxembourg and declared inadmissible the claims by the *Association Nationale d'Assistance aux Frontières pour les étrangers et autres*.



2.4. Other temporary reintroductions of internal border controls since 2016

Between mid-2016 and December 2017, eight countries have temporarily reintroduced internal Schengen borders owing to public security/public order concerns resulting from events taking place within their territories. Aside from the French temporary reintroduction of internal borders resulting from the UEFA Euro Cup 2016 and the Tour de France 2016 (see above), these included:

- **Poland** (4 July – 2 August 2016): NATO Summit (8 and 9 July), the World Youth Days (25 to 31 July) and the Pilgrimage of the Holy Father to Poland (28 to 31 July);
- **Malta** (21 January – 9 February 2017): Malta Informal Summit 2017 (3 February) and the Joint Valetta Action Plan Senior Officials Meeting (8 to 9 February);
- **Portugal** (10-14 May 2017): Pilgrimage of the Holy Father to Fatima-Portugal (12-13 May 2017);
- **Italy** (10-30 May 2017): G7 Summit (26-27 May 2017);
- **Germany** (12 June – 11 July 2017): G20 Summit in Hamburg (7-8 July 2017);³⁷
- **Norway** (26 August – 25 September 2017): UCI Road World Championship (16-24 September 2017); and
- **Sweden** (12-19 November 2017): Social Summit for Fair Jobs and Growth (17 November 2017).

³⁷ In this respect, the original notification on 15 May 2017 did not contain the specific dates of the reintroduction of internal borders owing to 'security concerns'. A subsequent notification by Germany less than a week before the start of the temporary internal border controls provided the specific dates.

3. INTERNAL POLICE CHECKS IN LIGHT OF EU BENCHMARKS

The SBC allows for the exercise of police powers by EU Member States competent authorities as long as **they are not effectively equivalent to 'border controls'**. Article 23 SBC states that the lifting of internal border checks "shall not affect Member States' exercise of police powers in accordance to national law". This same provision stipulates that internal police checks will not be considered equivalent to border checks when they meet the following **four conditions**:

1. do not have border control as an objective;
2. are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime;
3. are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders;
4. are carried out on the basis of spot-checks.

The legality and exact scope of the ways in which internal police checks are being implemented by Member States' law enforcement authorities has proved to be controversial in practice. The CJEU jurisprudence has provided important indications for assessing the compliance with EU law of Member States' 'spot checks' practices at internal borders which are applied in the absence of the (formal) temporary reintroduction of border controls.

The Luxembourg Court has stipulated in previous judgements that "the exercise of police powers may not be considered *equivalent* to the exercise of border checks when the police measures do not have border control as an objective ... and executed in a manner *clearly distinct from* systematic checks on persons at the external borders and are carried out on the basis of spot-checks" (emphasis added).³⁸ The CJEU has held that their compliance with the SBC "must be ensured by the details and limitations contained in *the framework for the practical exercise of the police powers* enjoyed by the Member States, a framework which should be such as to avoid such an equivalent effect" (emphasis added).³⁹ The Court has put special emphasis on the need for this national framework to allow for the testing of the purposes of defining the intensity, frequency and selectivity of police identity checks.

The specifics of that framework of intervention were addressed in the recent **Case C-9/16, Criminal proceedings against A of 21 June 2017** in relation to Germany. The case concerned the crossing on foot by the applicant of the 'Europe bridge' from Strasbourg (France) to Kehl (Germany), where he proceeded to the railway station. There he was checked by two officers of the German Federal Police on patrol at the railway station. On the basis of German legislation (point (3) of Paragraph 23(1) of the BPolG), those officers carried out an identity check. The applicant forcibly resisted the check and was charged with a criminal offence of resisting an enforcement officer under Paragraph 113(1) of the German Criminal Code.

The domestic German court asked two preliminary questions for interpretation before the CJEU: First, the extent to which Article 67.2 TFEU and Articles 20 and 21 of SBC preclude national law from granting the police the power to check within an area of 30 km the identity of the person "irrespective of the behaviour and other specific circumstances" with a view to preventing or terminating unlawful entry or preventing criminal offences in the absence of temporary reintroduction of border controls; and second, if EU law precludes police the power "to stop and question any person on a train or on the premises of the railways, with a view to preventing or terminating unlawful entry into that Member State, and to request that person to hand over for examination the identity documents or border crossing papers".

In answering these questions, **the CJEU set a number of 'legal standards or benchmarks' for determining the lawfulness of the national framework, chiefly:**

- **First**, it must be sufficiently clear and precise so as to allow these police checks to be tested (Para. 41); national law must provide the details or limitations on the power

³⁸ Refer to judgments of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 70, and of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 54.

³⁹ Judgment of 19 July 2012, *Adil*, C-278/12 PPU, EU:C:2012:508, paragraph 70.

- conferred (Para. 38), in particular in relation to the intensity and frequency of the checks (para. 57 of the judgement);
- **Second**, national legislation must guide the discretion of police authorities in the practical application of identity checks (Para. 39), so that “first, it is restricted to the border area of the Member State with other Member States and, second, it does not depend upon the behaviour of the person checked or on specific circumstances giving rise to a risk of breach of public order” (Para. 39);
 - **Third**, “*the more extensive the evidence of the existence of a possible equivalent effect, ... the greater the need for strict detailed rules and limitations* laying down the conditions for the exercise by national police powers in a border area and *for strict application of those detailed rules and limitations*” (Para. 40). This means an **incremental requirement of legal certainty** the higher the evidence on existence of equivalent effect is.
 - **Fourth**, the public objectives of police checks must be different from ‘border controls’ as stipulated in Article 2.10 of the SBC (Para. 42).⁴⁰

In the absence of the above, the Court held in **Case C-9/16** that it would not be possible to assess whether “those checks, first, are selective and thus not systematic like border checks and, second, are police measures applied on the basis of spot-checks.” The CJEU concluded that it is for the domestic national court to determine whether the national legislation complies with these standards (Para. 61).

As regards the extent to which the SBC precludes national law permitting police authorities to carry out, on board trains and on the premises of the railways of that Member State, identity or border crossing document checks on any person, the Court held that “the objective pursued by the provision at issue does not in itself mean that the checks carried out pursuant to the BPolG [Federal Police Law] have an effect equivalent to border checks” (Paras. 51 and 68). However, it stated that in contrast with general police identity checks “the *sole* objective of these checks on trains and railways is to prevent or terminate illegal entry into German federal territory, which might indicate that those checks have an effect equivalent to border checks”.

The CJEU held that German law did not “lay down any special rules concerning where the checks provided for in that provision may take place and thus does not distinguish between carrying out such controls in a border area and carrying them out elsewhere in the national territory” (Para. 69). Here the Court brought back **the incremental legal certainty benchmark** (Para. 72). There is moreover another German case pending on a preliminary ruling dealing with a similar issue.⁴¹

In the **Bi-Annual Report on the functioning of the Schengen area** (1 November 2011-30 April 2012)⁴² the European Commission issued **Guidelines** in Annex II “to ensure a coherent implementation and interpretation of the Schengen *acquis*”, including police measures in internal border zones. They Stated the need to evaluate how these checks are implemented in practice so as to check their proportionality in light of their objectives.

The Guidelines stipulated “when the Commission is confronted with serious allegations of borders checks in internal border zones, as stated in the 2010 report, it needs to seek concrete

⁴⁰ According to this provision “‘border checks’ means the checks carried out at border crossing points to ensure that persons may be authorised to enter the territory of the Member States or authorised to leave it.”

⁴¹ Reference for a preliminary ruling from the Amtsgericht Kehl (Germany) lodged on 21 June 2016 — Criminal proceedings against C. (Case C-346/16) (2016/C 335/46) dealing with the following questions: First, does EU law preclude national legislation which grants the police authorities of the Member State in question the power to search for an article, irrespective of the behaviour of the person carrying this article 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? Second, does EU preclude national legislation or practice which permits a criminal court in that Member State to use evidence to the detriment of the accused, although that evidence was obtained as a result of a State measure that infringes EU law? It is likely that the CJEU will leave here also to the national court to determine whether the above-mentioned EU standards are met in the domestic legal system.

⁴² European Commission, Biannual report on the functioning of the Schengen area 1 November 2011 - 30 April 2012, COM(2012) 230 final, Brussels, 16.5.2012.

statistical information from Member States; it may therefore request the Member State concerned to submit information on checks performed at the border during a given period (time, locations, reasons and the national authority responsible) as well as on *how these have contributed to reaching the aims laid down in national legislation or strategies, i.e. on combating cross-border crime.*" (emphasis added). In this regard, the Guidelines stipulated that "In this context, the existence of a risk assessment and the fact that the Member State concerned is taking measures not only in the internal border zone but in other parts of its territory will be taken into account by the Commission" (pp. 16-17).

The European Commission presented a **Recommendation on proportionate police checks and police cooperation in the Schengen area** on May 2017,⁴³ which reviews previous Commission Guidelines issued in 2012. The main message of the Recommendation is "to encourage" Member States "to better use their police powers and to give precedence to police checks before deciding on the temporary reintroduction of internal border controls" (Para. 13), specifically through the intensification of police checks across the entire territory and "main transport routes, including border areas" and making use of "modern technologies to monitor vehicles and traffic flows", which in any case need to be "subject to the applicable rules concerning camera surveillance, including data protection standards" (Para. 8).

The 2017 Recommendation puts a lot of emphasis on "the prerogatives of the Member States with regard to the maintenance of law and order and the safeguarding of internal security" (Para. 4), which within the remits of the Schengen governance system constitutes a rather sensitive statement. Indeed, insisting on the prerogatives of Member States on internal security could be interpreted as the European Commission allowing for a back door to reverse Europeanisation and 'Lisbonisation' as regards common EU border policy and Schengen.

It is on the other hand welcomed that the Recommendation states that measures should not "lead to obstacles to the free movement of persons and good which would not be **necessary, justified and proportionate** to those threats to public policy or internal security and that **it fully respects fundamental rights and in particular the principle of non-discrimination**" (para. 14). The Recommendation puts also emphasis on the need to take the neighbouring Member State views, concerns and interests into account when conducting these police checks, particularly at time of removing legal and operational barriers "to the full use of all cross-border operational police cooperation tools".

It adds however dubious and rather problematic statements, such as in paragraph 19: "As demonstrated by the recent migratory crisis, uncontrolled secondary movements of irregular migrants may pose a serious threat to public policy or internal security". Or in Paragraph 6: "Such checks may provide more efficient than internal border controls, notably as they are more flexible than static border controls at specific border crossing points and can be adapted more easily to evolving risks". Similarly, it is precisely this **flexibility in the use of police identity checks which may blur the line between what is and what is not equivalent to a border control, or what constitutes a disproportionate policing within the common Schengen area.**

Furthermore, the Commission Recommendation makes use of **language which blurs in certain passages the notions of "public security or internal security" with asylum.** This is most visible when it merges threats like "terrorism" and "secondary movements of persons who have irregularly crossed the external borders", which may include asylum seekers. Each of these phenomena call for a separated or differentiated assessment of their nature, scale and policy responses. What the Recommendation does not say expressly is that **the proportionality test of these national police measures remains in the hands of the European Commission and has been 'Europeanised' in the scope of the Schengen governance framework.**

The daily delivery of the CJEU benchmarks calls moreover for **a regular evaluation of the ways in which these internal policy checks and any joint police cross-border operational activities** (joint patrols and operations, or Joint Investigation Teams, JITs) between the two or several Member States are actually carried out in practice in light of the

⁴³ European Commission, Recommendation

SBC and the EU Charter of Fundamental Rights. The notion of “public policy and internal security” when used in the implementation of EU law or in policing activities directly or indirectly relevant from an EU law perspective must be read in light of EU Treaties, the SBC standards and the EU Charter of Fundamental Rights.

There is a substantial gap in knowledge regarding the quantitative uses and qualitative effects of internal police checks in EU Member States. Such a gap makes a proportionality and legality assessment unfeasible in practice. This calls for **a comprehensive and systematic overview or statistics on the use of these police internal controls by all Member States**. How many checks have been performed and what does this tell us about the proportionality of these police actions so as to prevent police from becoming de facto guards of blurred borders – and what are the exact criteria for the selection of persons to be checked?

The German Government has provided useful statistics on the use of controls based on the BPolG in response to Parliamentary questions about internal police checks: In 2015, about two million checks were performed on the basis of Article 23 (1) (3) BPolG (identity checks within 30 km area) and 1.5 million in 2016.⁴⁴ A way to gather this information could be to systematically record the uses of the Schengen Information System (SIS) II by national actors. The recorded data could be used as an **indicator illustrating how often and which people are checked. These data could thus be used to determine whether police identity checks de facto amount to border control.**

⁴⁴ Answers of the German government to parliamentary questions: see BT 18/11058, 1.2.2017, p. 6 ff.

4. FENCES AT THE INTERNAL AND EXTERNAL BORDERS OF THE SCHENGEN AREA

Prior to mid-2015 and the outburst of the so-called European humanitarian refugee crisis, only Spain (completed in 2005 and extended in 2009), Greece (completed in 2012) and Bulgaria (in response to Greece, completed in 2014) resorted to erecting fences at external borders, so as to prevent migrants and refugees from reaching their territories. The recent developments indicate that spaces of exception and “non-places” became the new normal.⁴⁵

Contrarily to SBC Article 14, which requires that “entry may only be refused by a substantiated decision stating the precise reasons for the refusal”, an increasing number of Member States has progressively embarked in the construction of border walls or fences aimed at indiscriminately preventing the access of migrants and asylum seekers in their national territories. Without explicit EU rules on setting up fences at the external Schengen borders, these countries have erected barriers between the EU and third countries (Morocco, Russia), including pre-accession candidates (Former Yugoslav Republic of Macedonia (FYROM), Serbia, Turkey), as well as an EU Schengen candidate country – Croatia. Fences have been also constructed within the Schengen area – the fence between Austria and Slovenia (see Figure 3 below, fences are highlighted in red). In a meantime, Spanish practices in Melilla have been scrutinised by the European Court of Human Rights in Strasbourg. This case sets an important precedent in the context of border walls and fences in the EU.

4.1. Recent developments: Europe erecting fences

Since the emergence of the refugee crisis there has been a noticeable ‘domino effect’ regarding the construction and development of border walls and fences in the EU. The decisions of single Schengen countries to erect border fences and reintroduce internal border controls have prompted similar actions in neighbouring countries.⁴⁶ This domino effect is illustrated in Annex 2.

In April 2016, it was estimated that:

European countries have built or started **1,200 km of anti-immigrant fencing** at a cost of at **least 500 million euros** [...] That distance is almost 40 percent of the length of America’s border with Mexico. [emphasis added]⁴⁷

Both the length of border fencing and the costs related to their establishment have increased ever since. Hungarian Prime Minister Victor Orbán claimed that as of September 2017 Hungary alone spent EUR 800 million in the construction of border fences and requested EU to pay half of the price ‘in solidarity’.⁴⁸ This request was swiftly rejected by the European Commission, who then responded that EU money is not aimed for the construction of fences or barriers at the external borders.⁴⁹

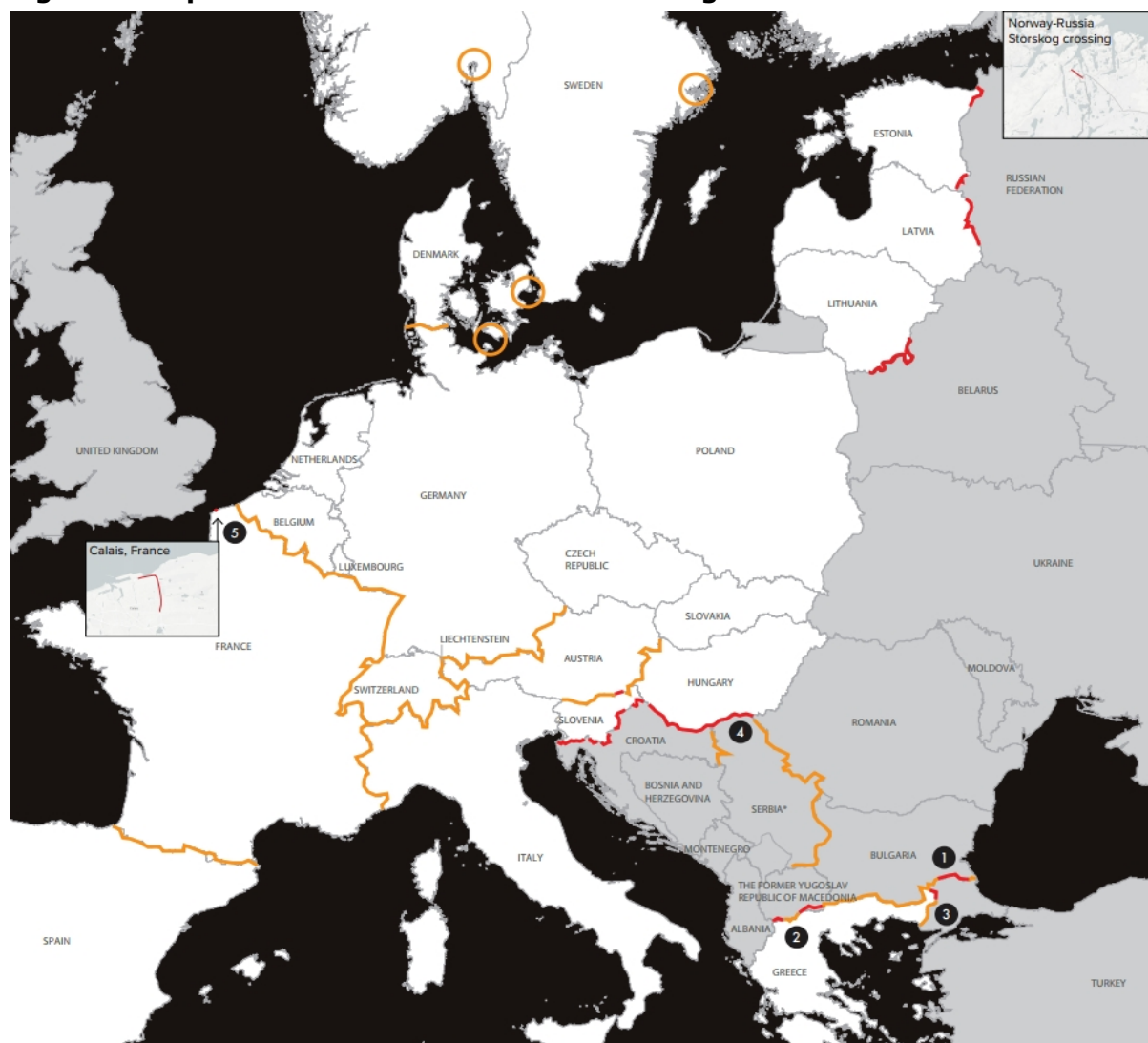
⁴⁵ Gammeltoft-Hansen, T. and J. Vedsted-Hansen (eds.) (2016), *Human Rights and the Dark Side of Globalisation: Transnational law enforcement and migration control*, Abingdon: Routledge.

⁴⁶ Rheindorf M. & R. Wodak “Borders, Fences, and Limits—Protecting Austria From Refugees: Metadiscursive Negotiation of Meaning in the Current Refugee Crisis”, *Journal of Immigrant & Refugee Studies* Vol. 0, Iss. 0, 2017. (<http://www.tandfonline.com/doi/full/10.1080/15562948.2017.1302032>).

⁴⁷ Baczynska, G. & S. Ledwith (2016) “How Europe built fences to keep people out”, REUTERS, 4 April, 2016. <https://www.reuters.com/article/us-europe-migrants-fences-insight/how-europe-built-fences-to-keep-people-out-idUSKCN0X10U7>.

⁴⁸ Nielsen, N. (2017) “Hungary demands EU payments for border wall”, EU Observer, Brussels, 1 September 2017, (<https://euobserver.com/migration/138849>).

⁴⁹ Nielsen, N. (2017) “Hungary demands EU payments for border wall”, EU Observer, Brussels, 1 September 2017, (<https://euobserver.com/migration/138849>).

Figure 3. Map of new border fences in the Schengen area*

Source: UNHCR (2017) Border fences and internal border controls in Europe, March 2017. (<https://data2.unhcr.org/fr/documents/download/55249>).

* Lithuania's fence is along the Kaliningrad Strip (Russian Federation), not with Belarus.

Among the more difficult issues inherent to border walls and fences, there is the role and responsibility of the EU agencies, such as Frontex/ EBCG, which has deployed officers assisting the Member States to conduct border controls and surveillance at the Hungarian/Serbian border. In addition, whereas currently the EU does not directly fund Member States to cover the razor wire and metal constructions, EU funding can be used for equipping such fences with surveillance systems, radars, cameras and other equipment. Such funding is allocated to research projects and security budgets from the External Borders Fund and Internal Security Fund-Borders.

The recent Transnational Institute (TNI) report indicates that "from 2007-10, EU funds contributed to the deployment of 545 border surveillance systems covering 8,279 kilometres of the EU's external borders and 22,347 items of border surveillance equipment."⁵⁰ The same report highlights, that various projects for militarising EU borders are ongoing including via

⁵⁰ Jones, Ch. (2017) "Market Forces: The development of the EU Security-Industrial Complex" TNI Report, 25 August 2017. (<https://www.tni.org/en/publication/market-forces-the-development-of-the-eu-security-industrial-complex>).

use of drones and other semi-automated systems.⁵¹ Yet, should border walls and fences benefit from such additional EU financial support?

Hungary vs. its neighbours

In response to the European refugee humanitarian crisis Hungary was among the first in moving towards the building of a razor wire fence as to prevent asylum seekers and migrants from reaching its territory. The Hungarian government has also trained and employed 3000 'border hunters' – whose aim is to protect the fence by arresting and/or returning persons who crossed the fence.⁵²

In addition, on 4 September 2015 the Hungarian Parliament adopted Act CXL of 2015 on 'The Amendment of certain Acts related to the management of mass migration' ('Amending Act'), which came into effect on 15 September 2015.⁵³ These amendments were integrated in the Hungarian Criminal Code, making it criminal offences to cross the border 'unlawfully', punishable with imprisonment of up to 3 years (Section 352/A of the of the Act C/2012 of the Criminal Code), to destroy border – up to 5 years (Section 352/B of the of the Act C/2012 of the Criminal Code), or to obstruct the construction of the border – up to 1 year (Section 352/C of the of the Act C/2012 of the Criminal Code).

In addition, new amendments were passed in July 2016. These have introduced an 'operational border regime' allowing border guards to fast-track border control and return procedures.⁵⁴ Already in October 2016, the Frontex Consultative Forum, which is composed of civil society actors and international organisations including UN agencies such as the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) raised serious concerns with the Fundamental Rights Officer, Frontex and the Management Board on the situation at the Hungarian-Serbian walled border:

[T]he impact of the new law of July 2016 on border control measures which, amongst others, obliges officers **to return migrants apprehended within 8 km** of the border back to the fence with Serbia. The new restrictive border measures of July 2016 ... have resulted in severely limiting and deterring access to asylum in Hungary and raise serious concerns with regards to compatibility with international and European law. [emphasis added]⁵⁵

The UNHCR was also concerned about the right of access to asylum. Within a working day, Hungary only accepts up to 10 persons within the so-called transit zone. In some periods, the number of asylum seekers allowed in the transit zone amounted to only 2 persons per week.⁵⁶ The broadened notion of 'migrant smuggling' as well as increased criminalisation of migrants and asylum seekers made the work of civil society and humanitarian organisations providing assistance or access to justice complicated, by limiting possibilities to access clients. International human rights organisations gathered evidence that refugees and migrants

⁵¹ TNI report indicates that such projects include: "SafeShore (€5.1 million), RANGER (€8 million) and ALFA (€4.6 million) seek to expand border surveillance, particularly through the use of drones. One previous project, TALOS (€13 million...) even tried to develop an automated border control robot."

⁵² Thorpe, N. (2016) "Migrant crisis: Hungary police recruit 'border-hunters'", BBC News, Budapest, 2 September 2016 (<http://www.bbc.com/news/world-europe-37259857>).

⁵³ BIROSAG (2015) "Communication: "On the amendment of certain Acts related to the management of mass migration", 22 September, 2015. (<http://birosag.hu/en/media/aktualis/communication-amendment-certain-acts-related-management-mass-migration>).

⁵⁴ Amended Section 71/A (1) of Act LXXX of 2007 on Asylum and newly added Section 5 (1a) of Act LXXXIX of 2007 on State Borders. Description found in Hungarian Helsinki Committee (2016) "Hungary: Recent legal amendments further destroy access to protection, April-June 2016", Brief information update by the Hungarian Helsinki Committee, 15 June 2016.

(<https://www.helsinki.hu/wp-content/uploads/HHC-Hungary-asylum-legal-amendments-Apr-June-2016.pdf>).
⁵⁵ Frontex Consultative Forum (2017) Fourth Annual Report Frontex Consultative Forum on Fundamental Rights of 2016, p. 38 – 39. (http://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_annual_report_2016.pdf).

⁵⁶ Than K. (2016) "Hungary's anti-migrant policies may violate international law: UNHCR", Reuters, 12 May, 2016. (<https://www.reuters.com/article/us-europe-migrants-hungary-un/hungarys-anti-migrant-policies-may-violate-international-law-unhcr-idUSKCN0Y32H9>).

experienced violence from the border guards and the so-called 'border hunters'.⁵⁷ The Hungarian Helsinki Committee has already submitted two cases on the violent border practices and push-backs on the Hungarian/Serbian border.⁵⁸

Already, in June 2015 the Hungarian government approved the construction of a **border fence with Serbia**, and the construction started in mid-July 2015.⁵⁹ The border fence was completed in mid-September 2015. It stretches for 175 km and separates Hungary and Serbia, leaving few official crossing-points where people could apply for asylum. In February 2016, Hungary announced that it was building a second border wall with Serbia along the existing fence, which would be even more "effective to hold migrants back".⁶⁰

The immediate effect of the construction of the first Hungarian/Serbian wall was the diversion of people towards Croatia.⁶¹ In mid-September 2015, Hungary itself started to build a 348 km **fence with Croatia**, which is a Schengen candidate country.⁶² In mid-October 2015, Hungary completed the construction of the fence along the border with Croatia.

On September 24, 2015, Hungary began building a razor wire **fence with Slovenia**, in the area around the Tornyiszentmiklós-Pince border crossing. This fence inside the Schengen area was built without informing the Slovenian authorities.⁶³ It was swiftly removed two days later after bilateral discussions.

In February 2016, Hungary announced its plans to build an additional 450 km-long fence **with Romania**, which is another Schengen candidate country.⁶⁴ Hungary further threatened to build a fence along the borders with Ukraine and Slovakia if it finds this necessary to protect itself from refugees and migrants. To date, the latter plans seem not to have materialised.

Austria vs. Slovenia

On November 2015, Austria began to construct a border fence with Slovenia. Austrian officials referred to it as a "technical barrier" made out of same razor wire. This contrs was a reversal of the previous Austrian position on fences.⁶⁵ Austrian Chancellor Werner Faymann had criticised border fences built by Hungary and claimed that "Austria's own 'technical measures' would be different".⁶⁶ In May 2016 Austria threatened to erect a fence with Italy, in a reaction to a large number of migrants arriving following Search and Rescue (SAR) operations carried out by the Italian authorities in Central Mediterranean route.⁶⁷ This caused a diplomatic affair as Italy and Germany were opposed to Austria's plan to build a fence on the Brenners passage.

⁵⁷ Carerra et al. (2018 forthcoming) "Policing Mobility Society", Hart publishing.

⁵⁸ ECtHR, Khurram v. Hungary, Application No 12625/17; H.K. v. Hungary, Application No 18531/17, Communicated on 21 December 2017.

⁵⁹ Kingsley, P. (2015) "Migrants on Hungary's border fence: 'This wall, we will not accept it'", 22 June, 2015 (<https://www.theguardian.com/world/2015/jun/22/migrants-hungary-border-fence-wall-serbia>).

⁶⁰ Dunai, M. (2017) "Hungary starts construction of second border fence", REUTERS, 27 February, 2017. (<https://www.reuters.com/article/us-europe-migrants-hungary-fence/hungary-starts-construction-of-second-border-fence-idUSKBN16614A>).

⁶¹ Mullen, J., I. Watson and S. Capelouto (2015) "Migrant crisis: Croatia closes border crossings as thousands stream in" CNN, September 18, 2015 (<http://edition.cnn.com/2015/09/17/world/europe-migrant-crisis/>).

⁶² Mullen, J., I. Watson and S. Capelouto (2015) "Migrant crisis: Croatia closes border crossings as thousands stream in" CNN, September 18, 2015 (<http://edition.cnn.com/2015/09/17/world/europe-migrant-crisis/>).

⁶³ Novinite (2015) "Hungary Starts Building Razor-Wire Fence along Border with Slovenia", September 24, 2015. (<http://www.novinite.com/articles/170976/Hungary+Starts+Building+Razor-Wire+Fence+along+Border+with+Slovenia>)

⁶⁴ Guettridge, N. (2016) "The Great Wall of Europe: Hungary splits continent in two with huge fence to stop migrants", Express.co.uk, 29 February, 2016. (<https://www.express.co.uk/news/world/648269/Hungary-plan-fence-border-Romania-migrants-refugees-crisis-Viktor-Orban-Schengen>).

⁶⁵ The Local (2015) Razor wire fence appears on Slovenian border, 5 November 2015. (<https://www.thelocal.at/20151105/razor-wire-erected-at-slovenian-border>).

⁶⁶ The Local (2015) Razor wire fence appears on Slovenian border, 5 November 2015. (<https://www.thelocal.at/20151105/razor-wire-erected-at-slovenian-border>).

⁶⁷ Reuters (2016) Italian police, demonstrators clash in protest against Austrian fence, 6 May, 2016. (<https://www.reuters.com/article/us-europe-migrants-border-brenner/italian-police-demonstrators-clash-in-protest-against-austrian-fence-idUSKCN0XY07Y>).

Slovenia vs. Croatia

On 11 November 2015, just a week after Austrian fence was started, Slovenians reacted by building their own **fence with Croatia**. The Slovenian prime minister also claimed that "the fence would help control the flow of people. He said his country would not have the resources to shelter large numbers of migrants over the harsh winter if Austria shut its border, creating a bottleneck."⁶⁸

FYROM vs. Greece

As part of the efforts to block the Western Balkan route, Former Yugoslav Republic of Macedonia (FYROM) built a **fence with Greece** in November 2015 and completed it in March 2016. Members of the European Parliament were active on the question as to whether funding from the EU Instrument for Pre-accession Assistance of EUR 12 million was used for this purpose and whether it is in line with the "spirit of the pre-accession" and fundamental rights.⁶⁹ The European Commission has vaguely answered that EU funding is not intended for the erection of fences and should be spent in line with the fundamental rights.⁷⁰ Nevertheless, the Commission has not further elaborated on the 'spirit of the pre-accession', which could be embedded in the 'spirit of Schengen Agreement' and Schengen Borders Code Article 14. However, while visiting the fence Commissioner Dimitris Avramopoulos admitted that "[a]ll our values are in danger today".⁷¹

Bulgaria vs. Turkey & Greece

By August 2016, Bulgaria completed 30 km long and 3.5-metre-high fence along its borders with Greece and Turkey near Rezovo city. The border fence was built due to rising fears of arrivals of migrants and refugees:

Each day, between 150 and 200 illegal immigrants who try to cross the Bulgarian border are sent back to Turkey.⁷²

Because of the impossibility for an individual assessment it is not clear whether these people were actually refugees and in need of subsidiary protection. The UNHCR called for the investigation into Bulgarian border practices amounting to 'illegal push-backs'. The concerns were raised after a violent incident was reported claiming that border guards had beaten a group of Iraqis of Yazidi ethnicity, resulting in two deaths.⁷³ According to Human Rights Watch:

The European Commission sent a letter to Bulgaria – the first step in legal action – concerning allegations that it broke EU rules by pushing Syrians back to Turkey, but has since been silent on the issue.⁷⁴

Since then, human rights organisations have found further evidence of violence and push-backs continuing at the Bulgarian border.⁷⁵ In March 2016 Bulgarian authorities also threatened to build a 484 km-long fence along the border with Greece, though there was no

⁶⁸ The Guardian (2015) "Slovenia starts building fence to control flow of refugees", 11 November, 2015 (<https://www.theguardian.com/world/2015/nov/11/slovenia-fence-refugees-veliki-obrez>).

⁶⁹ See: MEP Maria Spyraiki (2015) Parliamentary questions, E-014948-15, Question for written answer to the Commission (Rule 130), 23 November 2015; MEP Elissavet Vozemberg-Vrionidi (2015) 3 December 2015 E-015388-15 Question for written answer to the Commission (Rule 130).

⁷⁰ European Commission (2016) Parliamentary questions Joint answer given by Mr Hahn on behalf of the Commission to Written questions: E-015388/15, E-014948/15 18 March 2016. (<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2015-015388&language=EN>).

⁷¹ Baczynska, G. & S. Ledwith (2016) "How Europe built fences to keep people out", REUTERS, 4 April, 2016. <https://www.reuters.com/article/us-europe-migrants-fences-insight/how-europe-built-fences-to-keep-people-out-idUSKCN0X10U7>.

⁷² Oliphant, V. (2016) "Bulgaria builds 30km fence on Turkish border to keep migrants out", Express.co.uk, 11 August, 2016. (<https://www.express.co.uk/news/world/698963/Bulgaria-migrant-crisis-30-kilometre-fence-Greece-Turkey>).

⁷³ UNHCR (2015) "UNHCR calls for an investigation into the death of two Iraqis at the Bulgaria-Turkey border, raises concerns over border practices", 31 March 2015, Geneva. (<http://www.unhcr.org/551a70379.html>).

⁷⁴ Gall, L. (2015) "Dispatches: Stopping push backs at Bulgarian border", Human Rights Watch, 31 March, 2015. (<https://www.hrw.org/news/2015/03/31/dispatches-stopping-pushbacks-bulgarias-border>).

⁷⁵ Gall, L. (2015) "Dispatches: Stopping push backs at Bulgarian border", Human Rights Watch, 31 March, 2015. (<https://www.hrw.org/news/2015/03/31/dispatches-stopping-pushbacks-bulgarias-border>).

evidence found of actual construction. After a year, in March 2017 it was announced that "Bulgaria would extend the current 3.5-metre-high, 30 km long border fence with Turkey to cover the whole 240 km line separating the two countries [Bulgaria/Turkey]."⁷⁶ Bulgarian officials reported to the media that one of the main justification behind these developments was the fences set up by the neighbouring countries:

Officials have also highlighted their concerns that the closing of the Greece-Former Yugoslav Republic of Macedonia border might also force migrants to enter western Europe through Bulgaria.⁷⁷

This is a symptom of the domino effect created by separate Member States taking actions at their external borders. The lessons were not learnt from the 2012-2014 fences affair in this area. Ironically, at that time Greece was initiating the fence, whereas now it looks like non-Schengen countries are surrounding Greece with fences (FYROM and Bulgarian threats).

Lessons not learnt: Greece vs. Turkey, 2012 and Bulgaria vs. Turkey, 2014

In 2012, Greece erected a fence at the border with Turkey, in light of the Syrian crisis. The fence stretched for 12 km, adding a barrier to the Eyros River and aimed to prevent or divert migratory flows. As a reaction, in 2013 Bulgaria also started to build a fence with Turkey. This was openly admitted by Gil Arias Fernández, who at the time was the deputy executive director of Frontex. He stated that "[t]he result [of building fence in Greece] was that flow changed towards the Bulgarian border".⁷⁸ The fence was completed in 2014. It was aimed at demonstrating that Bulgaria is ready to protect its external borders and therefore entitled to join the Schengen Area.⁷⁹

Baltic States & Norway vs. Russia: The unexpected fences in the North-East of Europe

In January 2017 three Baltic states, Lithuania, Latvia and Estonia, also started to build fences, though their major concern was related to 'security threats' from eastern neighbours, namely Russia. For example, Lithuania has announced that it will build a 130 km-long fence along the Kaliningrad strip (part of Russian Federation, which lies between Poland and Lithuania). The Lithuanian foreign minister said that the EU will partly cover the expenses for this fence, which will be partly made from bricks and partly from wire razor.⁸⁰ Whereas the official reason is "stop[ping] the smuggling — of goods and people — organised on the Russian side" it seems to be driven more by security and geopolitical concerns.⁸¹

The Latvians and Estonians cited both concerns of security and also of stopping migrants and refugees coming from the east. In both cases, it appears that the EU will also be contributing financially to these plans. The EU will provide around EUR 100 million for the Baltic states to build 200 km of 'progressive fences' that will "include holes and gaps for animals to go back and forth in their natural habitat".⁸² There is well-established evidence, including that gathered by the EU's Fundamental Rights Agency (FRA), on how the border fences reduce the

⁷⁶ Global Security (2017) "Border Fence with Turkey", 26 March, 2017. (<https://www.globalsecurity.org/military/world/europe/bg-border-fence.htm>).

⁷⁷ Oliphant, V. (2016) "Bulgaria builds 30km fence on Turkish border to keep migrants out", Express.co.uk, 11 August, 2016. (<https://www.express.co.uk/news/world/698963/Bulgaria-migrant-crisis-30-kilometre-fence-Greece-Turkey>).

⁷⁸ Lyman, R. (2015) "Bulgaria Puts Up a New Wall, but This One Keeps People Out", April 5, 2015, (<https://www.nytimes.com/2015/04/06/world/europe/bulgaria-puts-up-a-new-wall-but-this-one-keeps-people-out.html#>).

⁷⁹ Lyman, R. (2015) "Bulgaria Puts Up a New Wall, but This One Keeps People Out", April 5, 2015, (<https://www.nytimes.com/2015/04/06/world/europe/bulgaria-puts-up-a-new-wall-but-this-one-keeps-people-out.html#>).

⁸⁰ Day M.(2017) Lithuania to build fence along its border with Russia to protect itself from 'provocations', , Telegraph UK, Warsaw , 17 January 2017.(<http://www.telegraph.co.uk/news/2017/01/17/lithuania-build-fence-along-border-russia-protect-provocations/>) .

⁸¹ Murray, D. (2017) "Lesser-known walls: How Trump's presidency is intensifying fear in the Baltics", CBC News January 29, 2017 (<http://www.cbc.ca/news/world/baltics-nato-trump-walls-1.3956504>).

⁸² Murray, D. (2017) "Lesser-known walls: How Trump's presidency is intensifying fear in the Baltics", CBC News January 29, 2017 (<http://www.cbc.ca/news/world/baltics-nato-trump-walls-1.3956504>).

chances to submit asylum claims and increase the risks of *refoulement*.⁸³ Thus, it seems that public concern is more focused on the possible harm to the habitat of wild animals than that of human beings.

The least-known border fence lies between Norway and Russia. In September 2016 Norwegian authorities started building this fence with an aim of preventing “migrant smuggling and irregular crossings of people from Syria” via Russia. The barrier is located at the Storskog border crossing. It is built of steel, is 200 m long and 3.7 m high. The fence includes a gate for road traffic, built in such a way that people cannot walk through it when it is closed.⁸⁴

4.2. Strasbourg Court: Human Rights Standards at the External EU border fences

The first of the EU’s external border fences was built by Spain. In 2017, it was finally scrutinised by the European Court of Human Rights (ECHR). The Strasbourg Court specifically focused on the assessment of the implication of these fences on the fundamental rights of potential asylum seekers. The fence was gradually constructed in the period from 2000 until 2005 with the aim of preventing arrivals of asylum seekers and migrants via Ceuta and Melilla (see Figure 4 below). The physical fence was enhanced with a surveillance system – radars, infrared cameras and video cameras that can detect not only people crossing, but also boats from a 10-15 km distance. By 2005, all the Strait of Gibraltar was accompanied with the so-called ‘Integrated System of External Vigilance’ (SIVE), which cost Spain approximately EUR 150 million.⁸⁵

The effects of building such a tech-enhanced multi-layered fence was merely to divert refugees and migrants towards the Canary Islands. This diversion of routes led to what is often referred to as the ‘cayucos crisis’ in 2006.⁸⁶ This ‘crisis’ caused a shift in Spanish and EU border management efforts, which were redirected to addressing the situation in the Canary Islands, through the establishment of a joint operational cooperation with FRONTEX agency and the development of bilateral cooperation with countries of transit and destination.⁸⁷

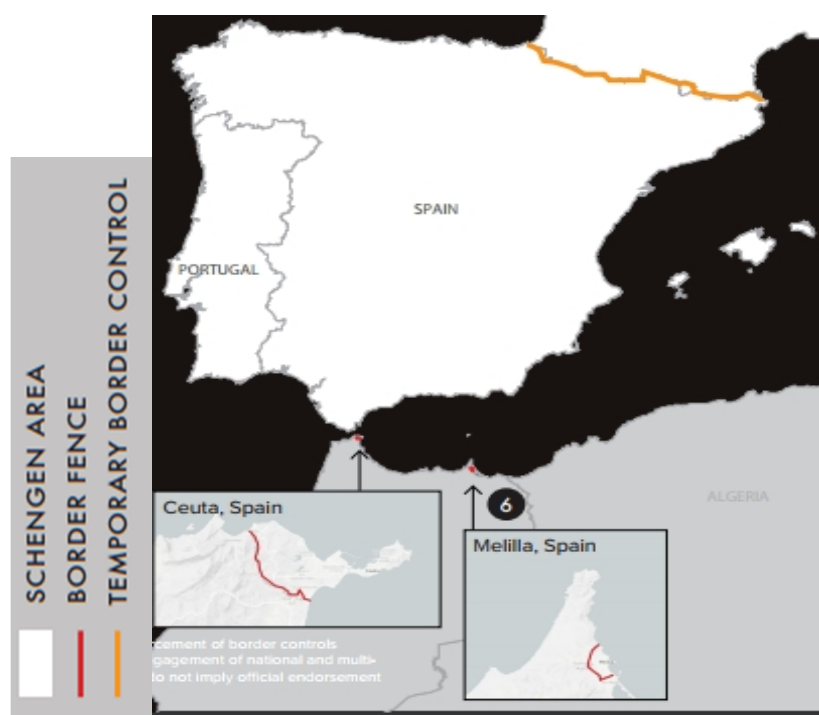
⁸³ FRA (2016) “Guidance on how to reduce the risk of *refoulement* in external border management when working in or together with third countries”, Paper, December 2016. (<http://fra.europa.eu/en/publication/2016/scope-principle-non-refoulement-contemporary-border-management-evolving-areas-law>).

⁸⁴ Reuters (2016) “Norway Will Build a Fence at Its Arctic Border With Russia” 24 August, 2016. (<https://www.nytimes.com/2016/08/25/world/europe/russia-norway-border-fence-refugees.html>).

⁸⁵ Carling, J. (2007) “The Merits and Limitations of Spain's High-Tech Border Control”, 7 June 2007, MPI. (<https://www.migrationpolicy.org/article/merits-and-limitations-spains-high-tech-border-control>).

⁸⁶ Godenau D. & A. Lopez Sala (2016) “Multi-layered migration deterrence and technology in Spanish maritime border management”, *Journal of Border Studies* 31 (2), 151 – 169.

⁸⁷ Carrera S. et al. (2018 forthcoming) “Does Offshoring Asylum and Migration Actually Work? A Comparative Assessment of International Experiences and Their Effectiveness”, CEPS, 2018.

Figure 4. Map of border fences in Ceuta & Melilla

Source: UNHCR (2017) Border fences and internal border controls in Europe, March 2017. (<https://data2.unhcr.org/fr/documents/download/55249>).

In 2009 the fences in Ceuta and Melilla were heightened up to 6 meters so as to prevent climbing.⁸⁸ At this stage the fence was once again enhanced with infra-red cameras, tear gas canisters, noise and movement sensors and control towers as well as technology to prevent the putting up of ladders.⁸⁹

This border fence has been heavily criticised by national and international human rights, humanitarian and faith-based organisations, not least as a waste of money and resources but also because of its profound human rights implications.⁹⁰ For example, in 2014 14 people died while trying to reach the coast of Melilla just meters before the coast, while the Border Guards from the other side of the fence shot rubber bullets.⁹¹ In addition, Spain has created a peculiar 'operational border regime', where persons in between the borders or climbing them were not regarded as being in the Spanish territory, the so-called 'non-places'.⁹² In 2015 Spain amended its Law on Protection of Public Safety ("Ley de protección de la seguridad ciudadana") to 'legalise' summary returns at the borders and this legislation was brought before the national Constitutional Court.⁹³

The Spanish fence case was brought before the European Court of Human Rights in Strasbourg which made a judgement on case *N.D. and N.T. v Spain* in October 2017. The Strasbourg court found that the Spanish practices of 'summary returns' were violating the

⁸⁸ Lopez Sala, A. (2015), "Exploring dissuasion as a (geo)political instrument in irregular migration control at the Southern Spanish maritime border", *Geopolitics*, 20 (3), 513 -534.

⁸⁹ BBC (2009) „World's barriers: Ceuta and Melilla“, 5 November 2009. <http://news.bbc.co.uk/2/hi/africa/8342923.stm>.

⁹⁰ Carling, J. (2007) "The Merits and Limitations of Spain's High-Tech Border Control", 7 June 2007, MPI. (<https://www.migrationpolicy.org/article/merits-and-limitations-spains-high-tech-border-control>).

⁹¹ AI (2015) „Spain Morocco – a tragedy at the border“, 6 February 2015. <https://www.amnesty.org/en/latest/campaigns/2015/02/spain-morocco-a-tragedy-at-the-border/>

⁹² Gammeltoft-Hansen, T. and J. Vedsted-Hansen (2016), op. cit.

⁹³ Gortázar Rotaache, C & N. Ferré Trad (2017) „A cold shower for Spain-hot returns from Melilla to Morocco: *N.D. and N.T. v Spain* ECtHR, 3 October 2017“, *European Migration Law Blog*, 20 October 2017, (<http://eumigrationlawblog.eu/a-cold-shower-for-spain-hot-returns-from-melilla-to-morocco-n-d-and-n-t-v-spain-ecthr-3-october-2017/>)

prohibition of collective expulsions (Article 4 of Protocol 4), and that no effective remedies were granted to individuals expelled (Article 13).⁹⁴ The ECHR reiterated the principles enunciated in the *Khlaifia v. Italy* judgement, according to which unless there is “a reasonable and objective examination of each individual case” the state’s actions are considered as a forced return of a group of aliens amounting to collective expulsion.⁹⁵ The Court, reacting to the Spanish Government’s justifications, also recalled the *Hirsi Jamaa v Italy* judgement, where it said that “problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State’s obligations under the Convention”. The case will later be heard before the ECHR’s Grand Chamber, as the Spanish Government has requested a referral.⁹⁶

This judgement will be important to evaluate the legality of the current practices of a number of EU Member States that have recently resorted to erecting border walls and creating peculiar border walled regimes that de facto and even de jure prevent persons from accessing asylum in the EU in line with EU asylum *acquis*. For example, the European Center for Constitutional and Human Rights has been taking a legal action on the similar practices of push-backs in Idomeni (at the Greek-Macedonian border) as well as in so-called hotspots in Greece.⁹⁷

In the case *N.D. and N.T. v Spain*, the European Court of Human Rights concluded that Spanish ‘operational border’ practices of returning all refugees and migrants at the external borders with Morocco in Melilla undermined the right of third-country nationals to submit asylum claims and ultimately amount to collective expulsions that are prohibited under the European Convention of Human Rights. It would be thus interesting if the European Court of Justice in Luxembourg would clarify the (in)compatibility of such practices with the right to seek asylum as enshrined in the European Charter of Fundamental Rights, as well as with the Schengen Borders Code, as the principle of *non-refoulement* is explicitly mentioned in Article 14 of the SBC.

⁹⁴ *N.D. and N.T. v Spain* ECtHR, n (applications nos. 8675/15 and 8697/15), 3 October 2017.

⁹⁵ *Khlaifia v. Italy*, No. 16483/12, ECtHR 2016, at par. 237 and in *N. D and N.T* at par. 98.

⁹⁶ ECtHR (2018) Grand Chamber Panel’s decisions - January 2018, Press Release - Referrals to Grand Chamber , 30/01/2018 ([https://hudoc.echr.coe.int/eng#{"itemid":\["003-5990165-7667371"\]}](https://hudoc.echr.coe.int/eng#{))

⁹⁷ ECCHR (2017) “ECtHR judgment on case of N.D. and N.T. vs Spain Expulsions conducted by Spain at the EU’s external borders violate the European Convention on Human Rights”, https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/migration/melilla.html.

5. LATEST POLICY DEVELOPMENTS: THE NEW COMMISSION PROPOSAL ON TEMPORARY REINTRODUCTION OF INTERNAL BORDERS

The rules for reintroducing internal border controls are laid down in Chapter II of the SBC (Articles 25 to 35). **The specific periods and deadlines granted to EU Member States to temporarily introduce border controls, as well as the criteria and reporting procedures applicable to each of these measures are essential elements of Chapter II of the SBC.** Under the current regime the following time schedule applies.

The general framework is laid down in Article 25 SBC, which stipulates that “[w]here, in the area without internal border control, there is a serious threat to public policy or internal security in a Member State”, border controls may be introduced “as a last resort” for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days. If “the threat” continues to exist, the same Article foresees that border control at the internal borders can be prolonged for renewable periods of up to 30 days each, which in total may not exceed 6 months. The procedure for re-introducing internal border checks is laid down in Article 27 SBC, which states **the main criteria:**

1. Notification to other Member States and the European Commission, and submission at the same time to the Council and the European Parliament, at the latest four weeks before the planned reintroduction, or within a shorter period;
2. Provision of the following information by the relevant Member State:
 - The reasons, including all relevant data detailing the events that constitute a serious threat to its public policy or internal security;
 - The scope, specifying the specific parts of its territory where controls will be applied;
 - The names of the authorised crossing points;
 - The date and duration of the action; and
 - Where appropriate, the measures to be adopted by other Member States.

Article 29 SBC currently envisages a specific procedure “where exceptional circumstances put the overall functioning of the area without internal border control at risk”. Article 29.1 SBC clarifies that these “exceptional circumstances” will need to be proportional to the threat to the overall functioning of the Schengen area “as a result of persistent serious deficiencies relating to external border control”, insofar as “those circumstances constitute a serious threat to public policy or internal security”. In these circumstances, this provision allows Member States to prolong internal border controls for “for a period of up to six months...[which] may be prolonged, no more than three times, for a further period of up to six months if the exceptional circumstances persist.”

On 27 September 2017, the European Commission has put forward **a new Proposal amending the Regulation 2016/399 as regards the rules applicable to the temporary reintroduction of border controls at internal borders.**⁹⁸ **It is not entirely clear to what extent the revision of the SBC was actually necessary or what its added value is** in light of the current Schengen rules. The proposal would significantly amend the SBC by **prolonging the above-mentioned existing time-frame permitting Member States to reintroduce internal border checks** before reaching the application/threshold of the ‘emergency option’ envisaged Article 29 SBC as follows:

First, the proposed revision of Article 25 SBC would allow individual Member States to introduce and prolong internal border controls for a total period of up to one year (as opposed

⁹⁸ European Commission, Proposal for a Regulation amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border controls at internal borders, COM52017) 571 final, 27.9.2017, Brussels.

to a total period of up to six months under the current SBC). Furthermore, a new Article 25.4 states that in exceptional circumstances envisaged in a new version of Article 27a SBC, the total period of internal border controls can be extended by “a maximum length of two years”. In cases where there are “exceptional circumstances” envisaged in Article 29 SBC, then the total period would be prolonged by a further two-year period.

Second, the proposed revision of Article 27 SBC includes an additional procedural criterion to the list of requirements to be submitted by the Member State reintroducing internal border checks, namely a **“risk assessment”** assessing “how long the identified threat is expected to persist and which sections of the internal borders are affected”, demonstrating that it is a last resort measure. Where the border control has already been reintroduced for more than 6 months, this risk assessment “shall also explain how the previous reintroduction has contributed to remedying the identified threat”. The proposed revision to Article 27 SBC emphasises that the Risk Assessment shall also include information on prior coordination between relevant Member States and that it be transmitted to the European Border and Coast Guard Agency (Frontex).

The proposed revision of Article 27 SBC would also allow the Commission to request additional information from the state concerned, including information needed to assess whether this is a last resort measure. **Special emphasis is therefore given to adequately ensuring the “last resort” test**. The Proposal also includes an obligation for the European Commission to issue an opinion following the notification if it is not convinced of the proportionality or necessity of the measure. Moreover, the Commission will also issue an opinion if the controls have been already running for six months. The proposal also includes **a more developed and formalised ‘consultation’ procedure**, which may include ‘joint meetings’ between the state reintroducing border checks, the affected Member State(s) and the Commission. The Commission’s proposal states that “[t]he proportionality of the intended measures, the identified threat to public policy or internal security as well as the ways of ensuring implementation of mutual cooperation shall be examined”. Moreover, the state planning to reintroduce controls “shall take the utmost account of the results of such consultation when carrying out border controls”.

From the preceding analysis, it is clear that the risk assessment to be included in accordance with the proposed Article 27 SBC will be drafted by the state introducing internal border checks. It is not clear what a “risk assessment” precisely entails, nor is it clear what the main components comprising such an assessment are. **It is problematic to put the functioning of the Schengen area in hands of a preventive logic based on “perceived risks”, instead of robust and solid evidence of the actual existence of any threat or challenge.** Moreover, the assessment should have been closely linked to the Schengen Evaluation Mechanism. It is clear that it should not be up to the Member State concerned to unilaterally assess what the situation or “risk” on the ground is to justify the proportionality and necessity of internal border checks.

Article 4.1 of Regulation (EU) No 1053/2013 stipulates that the Schengen Evaluation Mechanism covers “all aspects of the Schengen *acquis*, **including the absence of border control at internal borders**”. Article 4.2 emphasises that “[e]valuations may consist of questionnaires and of on-site visits which may be announced or unannounced. Announced on-site visits shall be preceded by a questionnaire. The on-site visits and questionnaires may, where appropriate, be used either independently or in combination in evaluating specific Member States and/or specific areas”. Article 13 of the same Regulation establishes that **unannounced on-site visits** to the internal borders “shall take place without prior notification to the Member State(s) concerned. General guidelines on practical arrangements for such visits shall be established by the Commission in close cooperation with the Member States”.

The evaluation of reintroducing internal border checks in light of the Schengen Evaluation Mechanism’s standards should be developed further and should be put into practice in addition to the risk assessment exercise. Whenever a state willing to introduce or reintroduce internal border checks issues a Risk Assessment, this should be tied **to a formalised operationalisation of the Schengen Evaluation Mechanism**. The General Guidelines on practical arrangements for such visits should equally be amended and linked to the new phase

of the procedure envisaged in Article 27a SCB. Furthermore, when the “threat” relates to the argument of “secondary movements”, the European Asylum Support Office (EASO), and its currently discussed transformation into a new EU Asylum Agency, should be operationalised on the ground to support the Member States concerned with the optimisation and soundness of its national asylum systems.

6. A NEW EUROPEAN INTEGRATED BORDER MANAGEMENT (EIBM) CONCEPT

The European Integrated Border Management (EIBM) concept has also been part of the strategy that the EU has elaborated “to compensate” for the abolition of internal borders within the Schengen area. This concept is based on the assumption that strengthened operational and technical cooperation at the EU external borders is necessary for both facilitating the legitimate movement of goods and persons and for the detection, prevention and reduction of irregular migration and cross-border crime.⁹⁹

Originally a political objective,¹⁰⁰ **the integration of border management at the European level is now expressly foreseen in EU primary law after the entry into force of the Lisbon Treaty in 2009.** Article 77(2)(d) of the TFEU includes the progressive introduction of a European IBM system among the goals to be achieved by the EU policies on borders checks, asylum and migration. **The integrated management of EU external borders has been a multi-dimensional concept which has served many interests.**¹⁰¹

At the normative level, it has entailed the development and implementation of common rules for the conduction of EU external borders checks, surveillance activities and return operations. In addition to the adoption of legislative and policy measures, the EIBM model has also served for the development of EU “risk analysis”, as well as the establishment of supranational systems for border surveillance (e.g. EUROSUR)¹⁰² and information exchange (e.g. the Second Generation Schengen Information System,¹⁰³ the Visa Information System,¹⁰⁴ Eurodac,¹⁰⁵ and the recently introduced Entry-Exit System)¹⁰⁶.

At the operational level, the creation of a European IBM system has relied on the development of a framework for coordination which applies to all relevant authorities and agencies involved in the performance of border security and immigration management functions in the scope of the Schengen system.¹⁰⁷ Under the EIBM regime, national authorities are not only meant to cooperate among themselves, but also with relevant EU Justice and Home Affairs agencies (e.g. Frontex, Europol and Eurojust, and EU-Lisa), as well as with the authorities of third countries. The active involvement of neighbouring countries, as well as the adoption of

⁹⁹ Wolff, S. (2010), EU Integrated Border Management beyond Lisbon: Contrasting Policies and Practices, Clingendael European Studies Programme (CESP), p. 23-24.

¹⁰⁰ European Council Presidency Conclusions, Laeken 14-15.12.2001.

¹⁰¹ Council Conclusions on Integrated Border Management, 2768th Justice and Home Affairs Council meeting, Brussels, 4-5.12.2006.

¹⁰² Regulation (EU) No. 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosir), OJ L 295, 6.10.2013.

¹⁰³ Regulation (EC) No 1986/2006 of the European Parliament and of the Council of 20 December 2006 regarding access to the Second Generation Schengen Information System (SIS II) by the services in the Member States responsible for issuing vehicle registration certificates.

¹⁰⁴ Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation).

¹⁰⁵ 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

¹⁰⁶ Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011.

¹⁰⁷ European Commission (2010), Guidelines for Integrated Border Management in EC External Cooperation, p. 27-33.

"measures in third countries" represent a central element of the so-called "four-tier access control model" which underpins the European IBM concept.¹⁰⁸

The implementation and future development of the European IBM concept falls under the "shared responsibility or competences" between EU and Member States' actors. It must be go hand-to-hand with Lisbon Treaty standards, secondary (Schengen-related) legislation –chiefly the SBC - and the EU Charter of Fundamental Rights. While this variety of actors belong to profoundly different administrative structures, and respond to specific institutional mandates, they have been functionally co-opted into the same multi-pronged EU border security framework. At the same time, and until recently, no clear normative indications have been provided at the EU level as to the exact ways in which executive powers, operational competences and related responsibilities were meant to be implemented and shared in practice between the EU agencies, Member States and third countries' authorities responsible for the implementation of the EIBM concept.¹⁰⁹ This has now changed with the establishment of the European Border and Coast Guard.

6.1. Enacting the EIBM? The European Border and Coast Guard

The first EU legislative attempt at enacting the EIBM was made with the adoption of Regulation EU/1624/2016, which renamed the EU agency Frontex as the European Border and Coast Guard (EBCG).¹¹⁰ This new piece of EU legislation describes the integrated management of EU external borders as a "fundamental component" of the Area of Freedom, Security and Justice (AFSJ), and entrusts the EBCG with an enhanced operational mandate which touches upon all the main components of the EIBM concept.¹¹¹

In the first place, the EBCG Regulation has expanded Frontex's operational tasks related to border controls and border surveillance. In the field of expulsion, the agency has been given the competence to implement joint return flights.¹¹² The EBCG is authorised to conduct these functions both within the EU and in cooperation with non-EU countries. Since the adoption of the EBCG regulation, the Agency can in fact carry out joint operations on the territory of, and in collaboration with, third countries which are neighbouring at least one EU Member State.¹¹³ The deployment of Frontex Liaison Officers is also instrumental to the EIBM strategy, as it aims at strengthening cooperation (including on return matters) among Member States and with third countries "of origin or transit regarding illegal immigration".¹¹⁴ Lastly, the Agency is required to perform "vulnerability assessments" on the basis of which weaknesses of the EU border protection system are meant to be identified, and "mitigation measures" adopted.¹¹⁵

Besides consolidating and expanding Frontex's in-the-field involvement in all the domains composing the European IBM concept, the new EBCG Regulation has also conferred the agency with the responsibility of designing the operational strategy and managing the technical infrastructure required for implementation. In fact, under the current normative framework, the EBCG Management Board¹¹⁶ - which acts on the basis of a proposal by the agency's Executive Director - is to provide for the strategic planning of the EIBM

¹⁰⁸ According to the definition provided by the 2006 Council Conclusions, the so-called EIBM "four-tier access model" covers: common visa policy, measures with neighbouring Third Countries, border control measures at the external border as well as risk analysis measures within the Schengen area, and return).

¹⁰⁹ Ferraro, F., De Capitani, E., (2016), *The new European Border and Coast Guard: yet another "half way" EU reform?*, *ERA Academy of European Law, Springer Online*, 8 December 2016.

¹¹⁰ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251, 16.09.2016.

¹¹¹ Recital 2 of the EBCG Regulation.

¹¹² Article 8 of the EBCG Regulation.

¹¹³ Article 54 of the EBCG Regulation.

¹¹⁴ Articles 12 and 55 of the EBCG Regulation.

¹¹⁵ Articles 12(8) and 19 of the EBCG Regulation.

¹¹⁶ The EBCG Management Board is composed of one Representative per EU Member State, and two representatives of the Commission. Article of the EBCG.

implementation "taking into account, where justified, the specific situation of the Member States, in particular their geographical location".¹¹⁷

In substance, with the introduction of the EBCG Regulation Frontex has become responsible for bridging the different elements/dimensions of the European Integrated Border Management and return system. Frontex involvement in the establishment of the EIBM is in fact both cross-border and cross-sectorial. It entails the performance, coordination, support and monitoring of border control, border surveillance and return operations, but it also covers the implementation of "solidarity mechanisms" provided by EU funding instruments (e.g. under the "North African window" of the EU Trust Fund for Africa), as well as the use of state-of-the-art technology including large-scale information systems.¹¹⁸ Under the EIBM strategic framework, Frontex is required to develop and maintain closer cooperation links with other security structures, including not only other EU JHA agencies (e.g. Europol and Eurojust), but also with military operations such as EUBAM Libya,¹¹⁹ the (recently extended) EUNAVFOR MED,¹²⁰ and other EU foreign affairs and defence initiatives, as confirmed by the Agency's Work Programme for the period 2018-2020.¹²¹

The role entrusted to EBCG in ensuring the effective implementation of the EIBM is in line with the wider process of 'agencification of the AFSJ',¹²² and in particular with the progressive 'empowerment' of EU JHA agencies as strategic players in the migration management field.¹²³ Formally, the involvement of Frontex in the design and implementation of the EIBM system responds to the objective of overcoming "the discrepancies that still remain at the national level".¹²⁴ The increase of the agency's competences, human resources, financial endowments, and technical assets is thus justified as necessary and instrumental to the creation of "an interoperable and unified strategic framework for European Integrated Border Management".¹²⁵

At the same time, by placing Frontex at the core of a system that functions on the basis of "threat assessments", "rapid border interventions", externalisation and (to some extent) militarisation of border controls and intelligence-led policing,¹²⁶ **the EIBM concept assumes a meaning that clearly prioritises the securitisation of borders over the objective of ensuring a "proper functioning of cross-border transport" and access to international protection.** In this regard, it is worth noting that in the provision of the EBCG regulation listing the EIBM components, no reference is made to the integration of customs policy, despite the fact that the latter constitutes an essential aspect of border management.¹²⁷

However, the actual integration of profoundly different (national, regional, and supranational) border security structures under the strategic coordination of Frontex remains problematic. In the first place, serious structural and domestically-embedded shortcomings affect the

¹¹⁷ Article 3 EBCG Regulation.

¹¹⁸ Article 4 of the EBCG Regulation.

¹¹⁹ Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya), OJ L138/15, 24.5.2013.

¹²⁰ Council Decision 2017/1385 /CFSP of 25 July 2017 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA), OJ L194/61.

¹²¹ See, Frontex Programming Document 2018-2020, 19 January 2017.

¹²² Curtin, D., Delegation to EU-non-majoritarian agencies and emerging practices of public accountability, in Gerardin, D., Munoz, R., Petit, N. (eds.) *Regulation through agencies in the EU*. Cheltenham, UK: Edward Elgar, p. 87-111.

¹²³ Scipioni, M. (2017), *De novo* bodies and EU integration: What is the story behind EU agencies' expansion?, *Journal of Common Market Studies*, pp. 1-17.

¹²⁴ European Commission, COM(2015) 671 final, 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, Strasbourg, 15.12.2015.

¹²⁵ European Commission, COM(2017) 219 final, Third Report from the Commission to the European Parliament, the European Council and the Council on the operationalisation of the European Border and Coast Guard, Brussels, 2.5.2017.

¹²⁶ Campesi, G. (2014), Frontex, the Euro-Mediterranean border and the paradoxes of humanitarian rhetoric, *South-East European Journal of Political Science*, Vol. II, No. 3, 2014, pp. 126-134.

¹²⁷ See supra note 17.

agency's capacity to effectively 'centralise' or 'integrate' border management functions as expected by the EIBM concept.

In fact, **under the EBCG regulation Member States still maintain the "primary responsibility" for the management of their external borders.** In practice, this means that national operational initiatives (including military operations with law enforcement purposes) can still be adopted by individual Member States, but also between them and in cooperation with third countries. The only limitation is the "compatibility" of such initiatives with the actions of Frontex. The effective 'integration' of the EBCG activities with national coast guard authorities remains equally to be seen. Moreover, the agency's "right to intervene" remains subject to a decision of the Council, which retains the power to approve the measures to be implemented by Frontex in cases where "urgent action" is needed in EU Member States facing profound deficiencies that could jeopardise the functioning of the Schengen area.¹²⁸

Therefore, while Frontex is conferred with increased human capacity and financial resources, **the EIBM system as defined under its current mandate does not seem to replace the old intergovernmental and disintegrated model of border control and surveillance.**¹²⁹ Importantly, however, the fact that **the IBM concept has been 'Lisbonised' and is now enshrined in the EU Treaties means that the ways in which the EBCG will implement the various IBM components must take due regard for the EU borders and asylum *acquis*, as well as the EU Charter of Fundamental Rights.**

6.2. Fragmentation of accountability regimes

Current EU attempts at supranationalising border and migration management under the umbrella of the EIBM also blur the accountability regimes applying to the different domestic and/or EU law enforcement (border and/or police) authorities and security actors involved in the establishment of the EIBM system in light of EU Treaty and legal standards. In particular, **the EBCG Regulation does not provide for clear rules on allocation and implementation of accountability in the implementation of the EIBM, in particular regarding multi-actor situations.**

Uncertainty as to the type of judicial and administrative remedies available arises, in the first place, in cases of the fundamental rights abuses that might be committed in the framework of Frontex joint operations. The different agents composing the Frontex "operational teams" are responsible for acting in line with the legal obligations provided in primary and secondary law provisions, and remain subject to the ethical and behavioural principles set forth in the Frontex Code of Conduct.¹³⁰ However, it is incumbent upon the home Member States' authorities from which the different agents are sent to exercise control over their deployed personnel. For example, in Frontex's Joint Operation European Patrols Network (EPN) Hera the national officials responsible for the maritime and aerial assets deployed at sea acted under the "command and control" of their respective home country.¹³¹

Article 21(5) of the EBCG Regulation explicitly stresses that it is incumbent upon individual countries to provide "appropriate disciplinary or other measures" which, in accordance with national law, should apply to violations of fundamental rights or international protection obligations committed by their border guards. Article 21(2) of the Frontex Code of Conduct further specifies that it is up to the "relevant authority of the Member State to use its powers regarding the necessary disciplinary measures and, if applicable, suspend or remove the

¹²⁸ Ibid., p. 46.

¹²⁹ Carrera, S., Blockmans, S., Cassarino J.P., Gros D., Guild, E. (2016), The European Border and Coast Guard Addressing migration and asylum challenges in the Mediterranean? CEPS Task Force Report.

¹³⁰ The Code of Conduct applies to all Frontex operational activities, including those which take place outside the territory of the Union and, to all persons participating in them (Article 1).

¹³¹ See, Frontex Operational Plan Joint Operation EPN Hera 2014, 2014/SBS/03.

person concerned from the respective pool for a defined period”.¹³² On the other hand, Article 43 of the EBCG Regulation establishes that, with regard to any criminal offences, members of the Frontex team shall be treated in the same ways as officials of the Member State hosting the joint operation.

Members of Frontex’s own staff are also subject to an accountability regime which is distinct from those that apply to the border and coast guards deployed by the national (EU or third-country) authorities involved in a particular joint operation. In fact, Frontex agents are only responsible for their actions or omissions before their Executive Director, based on the information received by the agency through its coordinating officers,¹³³ the serious incident reporting system¹³⁴ or in light of the allegations brought to the agency through the complaint mechanisms established under Article 72 of the EBCG Regulation. The power to activate disciplinary measures and potentially to suspend or terminate the relevant joint operation (in cases where violations of fundamental rights are of a serious nature or likely to persist) is thus exclusively based on an internal assessment conducted within the agency.¹³⁵

The complaint mechanism established under the EBCG Regulation is therefore affected by a structural lack of impartiality and transparency. In fact, complaints against Frontex officials are only handled internally within the agency, leaving the decision to the Frontex Executive Director. On the other hand, complaints against national officials rely on the existence of national complaint mechanisms and leave the different domestic authorities a large margin of discretion as to whether and how to follow up complaints received by the agency’s Fundamental Rights Officer (FRO) through the Frontex complaint mechanism. This prevents the mechanism established under article 72 of the EBCG regulation to meet the standards required for a remedy to as effective in the meaning of the European Charter of Fundamental Rights.¹³⁶

Furthermore, **the EBCG regulation does not provide for a system of systematic and independent monitoring capable of ensuring that the legal and behavioral standards provided in EU primary law** (i.e. the EU Charter) **and secondary legislation** (e.g. the Schengen Border Code, the Return Directive, etc.) are respected by the different authorities involved in border control, border surveillance, and return operations. Not only is the presence of independent return monitors not fully ensured in the different EU Member States,¹³⁷ but no obligation exists for the agency to appoint external monitors mandated to overview the implementation of border controls and surveillance activities performed in remote and unsafe contexts such as blue and green borders inside and outside states’ territories. **This generates substantial difficulties in effectively documenting and reporting abuses before existing complaint bodies.** It also hinders the collection of information and generating the necessary evidence on the safety of EU external borders, especially from the perspective of the fundamental rights of third-country nationals affected by the exercise of executive powers which are often involved in the conduction of border controls, border surveillance and/or return operations.

In substance, different accountability regimes (and related oversight systems) apply to the border and coast guards that, on a case by case basis, participate in an operational activity developed under the EIBM framework. The different types of complaint procedures and remedies that are available to individuals affected by border

¹³² Article 21(2) of the EBCG Regulation further stresses that “Only if the continued engagement of this person jeopardises the Frontex operational activity in question, the Executive Director may decide to suspend or remove him or her from that activity”.

¹³³ Article 22 of the EBC Regulation.

¹³⁴ Article 16(3)h Article 25(4) of the EBCG Regulation.

¹³⁵ Article 25(4) of the EBCG Regulation.

¹³⁶ Carrera, S., Stefan, M. (2018), Complaint mechanisms for fundamental human rights violations in the context of border management and joint expulsions operations, Issue Paper for the Office of the Council Of Europe’s Special Representative for the Rights of Migrants (forthcoming).

¹³⁷ See, Fundamental Rights Agency (2016), Forced return monitoring systems – State of play in 28 EU Member States (updated 26/4/2016).

control, border surveillance or return activities depend not only on the specific authority to which the agent that adopted the action or decision leading to an abuse is affiliated to (e.g. national police forces, coast guards, military, or civilians including doctors, private security company, etc.), but also on the type of mission and/or framework of cooperation within which the action or decision leading to a fundamental right infringement was adopted (e.g. Frontex joint operation, CDSP mission, international cooperation falling outside EU law, etc.). Specific accountability issues further arise from participation in the EIBM framework of military actors (e.g. the Member States' navies), and third-countries authorities.

6.3. Interlinking internal and external border surveillance actions

Under the EU IBM concept, the internal and external dimension of EU border surveillance measures are becoming increasingly intertwined. This trend is reflected in the ever-prominent contribution of defence actors in the development of the new EIBM strategy, both in terms of direct operational interventions (executive functions) and support provided to third countries in the field of border management (training, mentoring, and monitoring functions).¹³⁸

An example of operational involvement of EU Member States' navies in the implementation of the EIBM is provided by the Common Defence and Security Policy (CDSP) **EUNAVFOR MED Operation Sophia**. Originally the military actors participating in this operation were mainly mandated to fight against smugglers. However, **the scope of the mission has been recently expanded and now it formally involves IBM-related functions and in particular surveillance activities, search and rescue operations at sea and information exchange with Member States' law enforcement agencies, as well as with Frontex and Europol.**¹³⁹ The fact that the EBCG and CDSP operational activities are progressively overlapping is confirmed by a recent Commission report stating that the apprehension of suspected smugglers and traffickers and the "neutralisation" of more than 497 assets involved in such activities constitutes a result obtained through the joint deployment of naval units from both EBCG Joint Operation Triton and Operation Sophia.¹⁴⁰

The involvement of the military is thus increasingly seen as complementary to the activities of the EBCG agency in the south Mediterranean and it is giving new possibilities for interaction with other individual and bilateral initiatives of EU Member States (such as Italy).¹⁴¹ It has become, in substance, a key component of the overall "toolbox of CSDP support" to the EIBM concept. At the same time, it is important to note that **authorities involved in CDSP missions such as Operation Sophia are not subject to same norms, codes of conduct and oversight (rule of law) mechanisms that apply to the authorities participating in the implementation of the EBCG Regulation and EU primary and secondary borders and asylum acquis.** This means that victims of potential fundamental rights violations occurring at the hands of the authorities involved in Operation Sophia are not allowed to seek the same remedies to that would be available against abuses committed in the framework of an EBCG operational activity.¹⁴²

It is problematic that there has been an increasing demand for the CSDP to tackle border management tasks throughout the last decade and that the principles of Integrated Border Management (IBM) have been progressively incorporated into the strategic and operational

¹³⁸ European Commission, COM(2017) 669 final Report from the Commission to the European Parliament, the European Council and the Council Progress report on the European Agenda on Migration. Brussels, 15.11.2017.

¹³⁹ See, Council Decision (CFSP) 2017/1385 of 25 July 2017 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA).

¹⁴⁰ European Commission, COM(2017) 669 final, Report From The Commission To The European Parliament, The European Council And The Council, Brussels, 15.11.2017. Progress report on the European Agenda on Migration

¹⁴¹ See, Bevilacqua, G. (2017), Exploring the Ambiguity of Operation Sophia Between Military and Search and Rescue Activities, in Andreone, G., The Future of the Law of the Sea: Bridging Gaps Between National, Individual and Common Interests, Springer Open.

¹⁴² Carrera, S., Stefan, M. (2018), op. cit.

processes for the planning and conduct of CSDP missions abroad.¹⁴³ Several CDSP capacity building operations have in particular been developed to prompt authorities of unstable neighbouring countries into cooperating with Frontex. One of the components of the very same Operation Sophia is in fact to conduct training for the Libyan coastguard's personnel to be deployed in patrol boat crews. The CDSP operation is thus integrating other initiatives managed by the Commission and implemented by EU Member States such as the Seahorse Programme, which focuses on increasing the capabilities of the Libyan Coast Guard and other North African countries' authorities "with a view to longer-term work to establish the so-called "Seahorse Mediterranean Network".¹⁴⁴

Official documents expressly state that it is in the EU's own interest to help build the capacities of third countries to control their own territory, manage flows of people and goods, and address security challenges.¹⁴⁵ However, **by promoting the externalisation of border and coast guard functions, the EIBM concept endorses a strategy of progressive disengagement of the EU and Member States from human rights and rule of law-sensitive activities such as search and rescue operations on the high seas.** This is also confirmed by the fact that, compared to the precedent EPN Triton operation, the newly launched Frontex mission 'Themis' is operating further away from the Libyan territorial waters.¹⁴⁶ **By conferring an increased operational role on third countries' authorities, the Union and the Member States seem to be attempting to escape the responsibility that would apply for abuses over asylum seekers and immigrants committed under their own jurisdiction, as provided by the European Court of Human Rights' landmark judgment in *Hirsi Jamaa*.**¹⁴⁷

The exact role and actual responsibilities of foreign authorities acting de facto as agents under the strategic framework of the EIBM remain to a large extent unclear. This is also due to the fact that their missions are often covered by "soft law" instruments, such as Council Decisions, declarations, working agreements, memoranda of understanding and technical arrangements which, adopted outside the EU ordinary legislative decision-making procedures, escape the democratic and judicial scrutiny which, in a post-Lisbon Treaty framework, should apply to the EU measures and policies in the field of migration and border management.¹⁴⁸ At the same time, partial references in EU legislative texts such as the EBCG Regulation alone cannot address the problems related to the identification of the authority responsible for fundamental rights violations, nor solve the issue related to the uncertainty in the accountability regimes applicable to the different actors involved in the EIBM implementation.

6.4. Interlinking different large-scale databases for border management and surveillance purposes

The progressive interconnection and 'interoperability' of existing EU large-scale databases offers yet another example of the way in which the inter-agency and cross-sectorial approach underlying the EIBM concept results in a "blurring of boundaries"¹⁴⁹ between different EU policies ranging from immigration to criminal justice and police cooperation, and from foreign security policy to defence.

¹⁴³ See the Joint Staff Working Paper, Strengthening Ties between CSDP and FSJ road map implementation - Progress report, Brussels, 24 September 2012.

¹⁴⁴ Commission, Progress report on the European Agenda on Migration, COM(2017)/0669 final, Brussels, 15.11.2017.

¹⁴⁵ European Commission, COM(2016) 385 final Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration, Strasbourg, Strasbourg, 7.6.2016.

¹⁴⁶ Frontex, Frontex Launching New Operation in Central Med, 2018-01-31.

¹⁴⁷ European Court of Human Rights, *Hirsi Jamaa and other v Italy*, para. 81. See also ECtHR 3 October 2017, *N.D. and N.T. v Spain*, Application nos. 8675/15 and 8697/15, para. 54.

¹⁴⁸ Carrera, S., Den Hertog, L., Stefan, M. (2017), It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal, CEPS Policy Insight No 2017-15, April 2017.

¹⁴⁹ Mitsilegas, V. (2017) The EU Security Union as a Paradigm of Preventive Justice, in Carrera, S., Mitsilegas, V., Constitutionalising the Security Union: Effectiveness, rule of law and rights in countering terrorism and crime, CEPS Paperback Series, Brussels, 2017, pp. 8-10.

The achievement of **'full-interoperability' of EU information systems (e.g. SIS II, VIS, Eurodac and the recently introduced EES) constitutes a key component of the EIBM concept.** It is also part of the priorities pursued by the EU security agenda.¹⁵⁰ The interoperability-based data exchange promoted under the EIBM concept is rooted in the assumption that in order to effectively perform their functions EU Member States' border guards, law enforcement authorities, security actors and EU agencies as diverse as Frontex and Europol need "fast and seamless access to all information" collected in various central systems.¹⁵¹ As such, this mechanism entails not only the progressive interconnection of information systems established for different purposes, but also full availability (i.e. maximum collection and exchange) for national and European border guard, police authorities and intelligence services of personal data stored in different databases, irrespective of the main purposes for which these databases are established.

At the EU level, a series of legal and policy initiatives are currently under discussion to tackle the fragmentation of existing information systems. Mainly, these initiatives aim at enhancing border management and border security through the adoption of a series technical expedients including, for instance: a single search interface, a biometric matching service, a common repository of data and the development of interconnectivity between existing and proposed EU IT systems, Europol and Interpol databases (e.g. Stolen and Lost Travel Documents, and the Travel Documents Associated with Notices databases) and national IT systems.

By promoting the creation of "European wide integrated and modern border surveillance systems" which include large-scale information systems such as the EES, SIS II, VIS, EURODAC, INTERPOL and EUROPOL,¹⁵² **the EIBM concept has become instrumental to a model of border control and mobility surveillance which extends to all travellers, including EU citizens.** The exchange of different types of data among different actors under the EIBM concept and the EU security strategy is leading towards a regime of generalised surveillance of movement of persons across EU borders. This is confirmed, for example, by **the progressive expansion of the scope of SIS beyond the field of border checks, and the consequent use of this system for the purpose of police and judicial cooperation in criminal matters.**¹⁵³

At the same time, interoperability of information systems raises serious questions, in particular when it comes to access to databases such as SIS, VIS and Eurodac for purposes related to internal security and anti-terrorism.¹⁵⁴ These information systems were primarily designed as instruments for border management and migration control. However, **the use of the information contained therein by law enforcement and security authorities poses significant challenges to fundamental rights enshrined in the EU Charter, and in particular to the right to privacy, data protection, and non-discrimination.**¹⁵⁵ Also, as stressed by the Fundamental Rights Agency (FRA) in a recent publication on interoperability and EU information systems, the principles of data minimisation, purpose limitation and storage limitation "may be subject to new fundamental rights challenges" when IT systems become interoperable.¹⁵⁶

One of the main challenges deriving from the EU's current efforts at progressively interconnecting existing and proposed large-scale databases is **the overall lack of transparency regarding the exact distribution of tasks, access rights and conditions**

¹⁵⁰ Commission, The European Agenda on Security, COM(2015) 158 final, Strasbourg, 28.04.2015.

¹⁵¹ Commission, Inception Impact Assessment on Interoperability of information systems for migration and security, December 2017.

¹⁵² Commission's presentation on European Integrated Border Management : 11 STRATEGIC COMPONENTS, prepared for the Meeting of the Expert Group "Management of the External Borders", Brussels, 19-20.06.2017

¹⁵³ European Parliament Research Service, Revision of the Schengen Information System for law enforcement, briefing February 2018.

¹⁵⁴ Curtin, D. (2017), "Security of the interstice and interoperable data sharing: A first cut", in: S. Carrera and V. Mitsilegas (eds.), *Constitutionalising the Security Union: Effectiveness, rule of law and rights in countering terrorism and crime*, Brussels: CEPS, pp.67-68.

¹⁵⁵ Vavoula, N. (2017), *Immigration and Privacy in the Law of the European Union: The Case of Databases*, PhD Thesis, Queen Mary University of London.

¹⁵⁶ FRA (2017) Fundamental rights and the interoperability of EU information systems: borders and security.

for sharing information among the different authorities responsible for managing the system (the so-called end users).

In fact, each of the legislative acts establishing individual databases entrust upon different authorities the responsibility to act as controller and contain specific provisions regulating access the data, purposes of processing, storage periods and modalities related to data-sharing with third countries. Against this backdrop, it becomes increasingly difficult for the subject whose data (including biometrics) is collected, stored, exchanged and used through interoperable IT systems, to verify the legitimacy of these activities. As a consequence, while interoperability increases the risk of mistakes, unlawful access or misuse of personal information,¹⁵⁷ **the individuals' right to good administration and effective remedy in case of abuses is jeopardised by the unclear definition of the operational and oversight responsibilities under the existing EU data management architecture.** In a context of increased interoperability, different bodies become responsible for data protection obligations in respect to data contained in different IT systems but pertaining to the same person. This further blurring of roles and responsibility not only has negative repercussions on the data subject's right to an effective remedy, but is also likely to undermine trust among the different authorities responsible for handling and processing the information.

Collection of travellers' information at the border amounts, de facto and de jure, to a border check. The authorities performing such functions remain therefore subject to the fundamental rights standards and obligations deriving from EU primary and secondary law provisions. This means that **EU Member States' authorities performing border control and surveillance functions through the use of large scale information systems are under the obligation to respect the Schengen Border Code's provision requiring that measures undertaken in the context of these activities fully respects human dignity, are proportionate to the objectives pursued and do not discriminate on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.**¹⁵⁸

6.5. The revised EU Smart Border Package

The Smart Border Package is also a "part of the continuous development of the Integrated Border Management Strategy". It refers to an EU initiative aimed at complementing the existing EU large scale information systems established for the collection and management of borders, migration and asylum-related data.¹⁵⁹

The official aim of the Smart Border Package is to "fill the information gaps" that the three large-scale databases already developed by the EU (i.e. SIS, VIS and Eurodac) left in areas related to the management of external borders, reduction of overstays of irregular migration and the fight against terrorism and serious crime.¹⁶⁰

The main shortcomings to be addressed by the revised version of the "Package" proposed by the Commission in 2016 include:

- The insufficient quality and speed of border controls involving third-country nationals;
- The impossibility under the current system to ensure a systematic and reliable monitoring of third-country nationals' stay within the Schengen area; as well as
- The difficulty related to the identification of third-country nationals in case they destroy their official documentation after entering the Schengen area.

¹⁵⁷ Ibid, pp 25-28.

¹⁵⁸ See Article 7 SBC.

¹⁵⁹ European Commission, Revised Proposal for (a) regulation(s) establishing an EU Smart Border System, Inception Impact Assessment, Brussels, June 2015.

¹⁶⁰ European Commission, Statement *Security Union: Commission welcomes adoption of Entry/Exit System for stronger and smarter EU borders*, Brussels, 25.10.

Compared to the original 2013 proposal,¹⁶¹ the 2016 version of EU Smart Borders presents a wider scope. In fact, it is not only limited to the border management-related objectives of reducing waiting time at border checks, improving the quality of identity checks, and gathering more accurate information related to so-called “overstayers”. It now also serves a new purpose, namely law enforcement access and use of travellers’ data gathered during border controls. With a view to achieving these objectives, EU regulations have recently been adopted to establish an Entry/Exit System (EES) and amend the Schengen Border Code accordingly.¹⁶² In its current version, the EES Regulation establishes a legal framework and technical infrastructures providing for:

- The automatic data collection and systematic recording of external border crossing movements of all third-country nationals (i.e. both visa-required or visa-exempt) visiting the Schengen area for a short stay (maximum 90-day period in any period of 180 days); and
- The tracking of the time spent by the individual third country national during his/her stay within the Schengen area. By recording entries and exits of each and every third-country national the EES aims at calculating the length of their stay. In case of detected overstay, the EES would raise an alert.

According to the EES Regulation, which also merges the proposal for the creation of a Registered Traveller Programme (RTP), the new centralised EU database is due to become operational in 2020. The European Agency for the Operational Management of large-scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) is mandated to start building the EES in cooperation with the Member States.

The Council of the European Union described the EES as an important tool for “improving external border controls, and ... strengthen[ing] the fight against terrorism”.¹⁶³ However, a series of concerns have been raised with regard to the (disproportionate) impact that the rollout of the EES is likely to have on the fundamental rights of the third country nationals falling under its scope of application. Several EU bodies including the Committee of the Regions (CoR),¹⁶⁴ the European Economic and Social Committee (EESC),¹⁶⁵ as well as the European Data Protection Supervisor (EDPS)¹⁶⁶ and the FRA have expressed doubts as to the compatibility of the EES with existing EU privacy and data protection standards. **Concerns related in particular to the fundamental rights implications deriving from the establishment of a new EU system retaining large amounts of both personal and biometric data.**

In fact, in order to facilitate identification and return of overstayers, **the new system allows for generalised “biometric ID checks” which entail the collection of biometrics for all third-country nationals travelling to the EU.** In the first place, the EES foresees the possibility to collect third-country nationals’ fingerprints or facial images allowing for the creation of “a file” for each traveller. The file will then subsequently be used for re-identification of the individual at every border crossing. According to the EES regulation, these data will be retained in a centralised system, for up to five years.¹⁶⁷ The EES applicability to

¹⁶¹ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union COM(2013/095) final.

¹⁶² Regulation (EU) 2017 of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011.

¹⁶³ Article 34.3 of the EES Regulation.

¹⁶⁴ Opinion of the Committee of the Regions on ‘Smart Borders package’, OJ C 114, 15.4.2014, p. 90–95.

¹⁶⁵ Opinion of the European Economic and Social Committee on the ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration’ (COM(2015) 240 final), OJ C 71, 24.2.2016, p. 46–52.

¹⁶⁶ See the Executive Summary of the Opinion of the European Data Protection Supervisor on Personal Information Management Systems, 2016/C 463/10.

¹⁶⁷ Recital 33 of the EES Regulation.

all TCNs will also significantly expand the overall EU's biometric information system, as it applies to each and every third-country national crossing the EU external borders.

Specific issues also derive from the fact that the EES will be interconnected with other large-scale EU data bases, such as the VIS. The risks concerned with the interoperability of existing EU databases have already been considered in the previous paragraph. The EES Regulation fails to address key issues in that respect, including the risks deriving from the possibility of granting different security forces access to the system. In fact, it seems that under the EES data could be shared not only with authorities in the EU, but also with third countries, international organisations, as well as private parties pursuant to the broad exceptions in the Regulation.¹⁶⁸ At the same time, **it is not clear how the end users' respect of privacy and data protection standards will be ensured, given the lack of clear indications as to the oversight and complaint mechanisms available to data subject in case of abuses.**

Also, a series of critiques pointed at the lack of transparency regarding the new system's actual necessity, costs and practical utility. Perplexities have in particular been expressed as to the EES' actual fitness to ensure swift border procedures. In this regard, the CoR noted that collecting biometric data would increase travellers' waiting time during borders check, a remark which was also shared in the European Commission's impact assessment. On the other hand, longer waiting time increases the "risk of error", as expressly indicated by the Article 29 Data Protection Working Party (WP29).¹⁶⁹ Not least important, there is uncertainty regarding the actual capacity of the EES to achieve the system's very own objective of tackling irregular migration. In the respect the claimed 'added value' of the EES is that it will be able to provide more accurate information about patterns of overstaying. While it is often claimed that such persons comprise the largest category of 'illegal migrants' in the EU, accurate statistics still do not exist.¹⁷⁰ On the other hand, the expanded scope of application seems to confirm that the EES constitutes yet another building block toward the establishment of "cyber fortress Europe".¹⁷¹

¹⁶⁸ Article 38 EES Regulation.

¹⁶⁹ Article 29 Opinion 05/2013 on Smart Borders, 06.06/2013.

¹⁷⁰ Bigo, D., Carrera, S., Hayes, B., Hernanz, N., Jeandesboz, J. (2009), Evaluating current and forthcoming proposals on JHA databases and a smart borders system at EU external borders, Study for the European Parliament, Policy Department C: Citizens' Rights And Constitutional Affairs.

¹⁷¹ Guild, E., Carrera, S., Geyer, F., (2008), The Commission's New Border Package: Does it take us one step closer to a 'cyber-fortress Europe'?, CESP Policy Brief, No. 154, March 2008

7. CONCLUSIONS AND RECOMMENDATIONS

This Study has examined the latest legal and policy developments concerning the state of the Schengen system since 2016. A key finding emerging from this assessment is that the Schengen regime remains 'crisis-proof'. It is however imperative for Member States' Ministries of Interior to move beyond crisis-modes of policy making on migration, asylum and borders and to take up their political and legal responsibilities towards a stable 'crisis-proof' European Asylum System. This is particularly so in respect of the much-needed reform of the EU Dublin Regulation and the establishment of a corrective allocation mechanisms of permanent and automatic nature, for sharing responsivity in assessing asylum applications in the EU.

All latest developments and proposals which have been included by the Commission in the 'back to Schengen' roadmap, including the various components comprising the EU's Integrated Border Management (IBM) concept, must be closely tight to existing EU democratic rule of law and fundamental rights standards provided by the Lisbon Treaty, the EU Charter of Fundamental Rights and EU secondary legislation – chiefly the Schengen Borders Code. The European Refugee Humanitarian Crisis must not continue to be used as an excuse to reverse 'Europeanisation' or re-gain Ministries of Interior discretion in the Schengen area and the checks and balances characterizing its current governance framework, where the European Parliament has played a major role as co-legislator.

7.1. More scrutiny over internal border controls in the Schengen Area

All EU Member States which are still applying the reintroduction of internal border controls should lift them as soon as possible so as fully comply with the procedures and criteria outlined in the Schengen Borders Code. **All the deadlines and procedures envisaged in Articles 25-29 SBC have expired and it is time for them to lift the border controls and bring Schengen to 'normality'.** Decisions such as the one issued by the French Council of State are misreading the provisions envisaged in the Schengen Borders Code and are not in compliance with current EU Schengen rules.

The European Commission and the European Parliament should call all relevant Member States to provide sound and full evidence about the proportionality, necessity and 'last resort nature' of current border checks. Member States should also provide evidence on the exact ways in which internal border checks help in addressing the identified "threats" and challenges. Unless this is done at the earliest convenience, these Member States should be called to respect their legal commitments in the Treaties and secondary legislation. Member States should stop using potential or future "secondary movements" of asylum seekers inside the EU as a ground justifying internal border checks. They should instead speed up and increase the implementation of their pledges for relocations from Italy and Greece.

The new Commission Proposal extending the time-periods for Member States to reintroduce internal border checks calls for a careful added value assessment. It is not clear based on the information provided in the Member States' notifications that a revision of the SBC is actually necessary, neither is the utility of extending currently envisaged time-periods. Moreover, putting the extensions in the hands of Member States issuing a 'Risk Assessment' is a very risky exercise in itself as it will not allow European institutions to precisely measure the robustness and objectivity of the assessment to be provided by the Member State concerned.

The workings and spirit of Schengen cannot be abandoned at the expense of future potential risks assessments of dubious accuracy and value. The proposed **"risk assessment" is further problematic, as the assessment is entirely placed in the hands of the state that is reintroducing border controls.** It is clear that it is not only for the Member State concerned to unilaterally assess what the situation or "risk" on the ground is, as a way to justify the proportionality and necessity of internal border checks. Instead the Schengen governance framework must be based on **the best evidence and objective assessment** about the adequacy and proportionality of any exceptions applicable to the lifting of internal

border checks. **Any Member State introducing and/or prolonging internal border checks beyond six months should be included into the Schengen Evaluation Mechanism procedures and be subject to on-site (announced and unannounced) evaluation visits reviewing their nature, effects and necessity.**

Rather than on reforming the Schengen Evaluation Mechanisms - which did not show to be dysfunctional nor ineffective in any way - new proposals should rather focus addressing the major delays witnessed from the on-site visit to the implementing decisions and action plans. In order to facilitate this process, **the EU border monitor could be mandated to swiftly initiate and handle remedial actions on the part of the Member States.**

When the “threat” relates to the argument of “secondary movements”, a key role should be foreseen for the European Asylum Support Office (EASO), and its currently discussed transformation into a new EU Asylum Agency, to support the Member States concerned with the optimisation and soundness of its national asylum systems. **The proposed reform of the Dublin III Regulation by the European Parliament¹⁷² should be adopted as soon as possible by EU Member States. If no swift progress is made in that respect, the European Parliament should freeze ongoing negotiations on all files which are of interest to Justice and Home Affairs Ministries such as the recent interoperability proposal, the revision of the Eurodac system¹⁷³ any new financial frameworks and other relevant files.** The European Parliament has already successfully adopted this approach with the so-called ‘Schengen freeze’ back in 2012, when it decided to react to the Council’s decisions to change the legal basis for the Schengen Governance Package with the ‘freeze’ of cooperation on the main JHA dossiers under negotiation.¹⁷⁴

The European Parliament should call for the setting up of a formal complaint mechanism system for EU citizens and third-country nationals whose rights and freedoms may be jeopardised or violated in the context of internal border checks. An EU Border/Asylum Monitor should be set up for these very purposes which would be deployed in relevant Member States’ sites where internal border checks are reintroduced and who would receive and take stock of these individuals’ complaints.

7.2. Better monitoring of police checks within the Schengen Area

Aside from situations where internal border checks are introduced, the spread of internal police checks also raises particular concerns regarding their legality in light of the Luxembourg Court’s benchmarks. All EU Member States must make sure that their national legislation complies with the legal standards which have been developed by the CJEU in order to guarantee that they remain not equivalent to border checks and that their intensity, frequency and selectivity complies with the SBC. Flexibility in the implementation of police checks blurs the boundaries between what are proportionate police checks and what are border checks contrary to the spirit of the SBC. A key goal should be to ensure legal certainty and

¹⁷² European Parliament, Draft Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council 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 (recast), Report, 06.11.2017.

¹⁷³ European Commission, Proposal for a Regulation of the European Parliament and of the Council 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], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes (recast). COM(2016) 272, 2016/0132(COD) Brussels, 4.5.2016.

¹⁷⁴ The five dossiers concerned were: Amendment of the Schengen Border Code and Convention implementing the Schengen Agreement; Judicial cooperation in criminal matters: combating attacks against information systems; European Investigation Order; Budget 2013 aspects relating to Internal Security; and EU Passenger Name Records. See, S. Carrera, N. Hernanz, J. Parkin (2013), The ‘Lisbonisation’ of the European Parliament: Assessing Progress, Shortcomings and Challenges for Democratic Accountability in the Area of Freedom, Security and Justice, Study for the European Parliament, Policy Department C – Citizens’ Rights and Constitutional Affairs, PE 493.012.

proportionality in the conduction of internal police checks and a non-discriminatory approach in their application.

Instead of reintroducing internal border controls, and as proposed by the European Commission Recommendation on proportionate police checks, EU Member States could give priority to improving cross-border operational police cooperation in the fight against criminality, in cooperation with relevant EU Agencies like Eurojust and Europol. There are interesting potentials in making proper and efficient use of Joint Investigation Teams (JITs) in full compliance with EU standards such as those envisaged in the European Investigation Order (EIO).¹⁷⁵ Special focus should be given to address their current JITs shortcomings – both at legal and procedural levels.¹⁷⁶

A key gap identified in this report is the quantitative scale and qualitative effects of internal police checks in EU Member States. **The EU should set up a systematic and permanent monitoring system of EU Member States' police checks falling within the scope of the SBC** for instance by including in the SIS II a reporting and statistical component. Similarly, there should be a complaint mechanism effectively operating from the moment when national police authorities meet the person on the move and include data or have access to EU information systems such as the SIS II, VIS or Eurodac, in particular regarding compliance with EU privacy and data protection legal standards. This is particularly more pertinent in light of the prospect of the 'smart borders' package and the current discussions on the European Travel Information and Authorisation System (ETIAS).

7.3. Erection of Border fences shall be brought back in line with the SBC

The European refugee humanitarian crisis has also seen the erection of new physical border walls and fences in several EU Member States sharing the common EU external border. The SCB is clear when stating that there cannot be walls for refugees. **The compatibility of these fences and walls, and the practices surrounding them, should be more carefully scrutinised by the European Commission**, not only concerning their impact on fundamental rights, but also from the standpoint of the 'spirit of Schengen'. This Study reveals that border walls and fences lead to a domino effect of illegal and exceptional practices which should not be permissible by any EU Member State.

It would be central to clarify the compatibility of such practices with the right to seek asylum as enshrined in the European Charter of Fundamental Rights as well as with the Schengen Borders Code, as the principle of *non-refoulement* is explicitly mentioned in Article 14 of the SBC. Schengen Evaluation missions should be dedicated to assessing the role and impacts of fences in light of the principle of sincere and loyal cooperation among EU Member States, which is the founding principle of the Schengen Agreement and the SBC.

In addition, it would be important, in a similar fashion as for internal border controls, to notify the European Commission and the Parliament, as well as neighbouring Member States, about the very pressing reasons for the introduction of such fences. These notifications would need to assess the proportionality and necessity, duration and impact on fundamental rights, as well as the rights of EU citizens (e.g. private property) and broader political and environmental impacts. One of the conditions could be, for example, whether the Member State concerned has fully met its relocation quota. It would be difficult for Member States to invoke the fear of secondary movements while their own pledges to accept asylum seekers have not been fulfilled.

The realities of and practices at these fences should further be subject to SEM unannounced visits. The Frontex Consultative Forum should be given more independence in selecting and interviewing border guards and Frontex officers as well civil society organisations, and access

¹⁷⁵ European Commission, "As of today the "European Investigation Order" will help authorities to fight crime and terrorism", Press Release, 22 May 2017

¹⁷⁶ S. Carrera, E. Guild, L. Vosyliūtė, A. Scherrer and V. Mitsilegas (2016), "The Cost of Non Europe in the Area of Organised Crime", Study for the European Parliament, DG EPRS, Brussels

detained migrants and asylum seekers in the border areas where there are fences, whether on the EU or the third-country side of the border.

7.4. Strengthening the role and independence of the EBCG Consultative Forum and Fundamental Rights Officer

Regarding the roll-out of the EBCG, the currently envisaged complaint mechanism does not offer an effective remedy in light of EU and international human rights standards. Independent monitoring of all Frontex operational activities should be ensured through the enhancement of the role of Frontex Consultative Forum. Its representatives should be granted presence at relevant sites where border controls and surveillance take place. There should be a clearer obligation and accountability for Frontex Executive Director Decisions to suspend EBCG operations presenting fundamental rights or rule of law challenges.

The FRO should be granted the competence and means to effectively monitor the follow up of complaints received by the agency and regarding Member States' authorities. The FRO should be entrusted with more human resources capacity and a wider power to closely monitor how human rights complaints are followed up domestically by the responsible institutions established at the national and/or local level. The FRO should be allowed to bring the issue before the European Ombudsman in cases of inadequate follow up. This would ensure a systematic implementation of the right of good administration envisaged in the EU Charter of Fundamental Rights.

7.5. Keeping Intact the Lisbonisation of the EU integrated border management strategy

The participation of the EU institutions remains essential for the development of the European Integrated Border Management strategy. In particular, the Commission, the European Parliament, and the Council have the legal responsibility to shape the "political strategy" underlying the operationalisation of the EIBM. The need for the EU co-legislators' involvement in the development of a European IBM system is not only required in the EBCG regulation,¹⁷⁷ but ultimately derives from the post-Lisbon Treaty communitarisation of EU policies on migration and border management. However, the development of an overarching EIBM strategy should not mean reversing the Lisbonisation of the IBM concept.

All in all, the notion of interoperability challenges the 'constitutionalisation' of the concept of IBM in the Lisbon Treaty and presents profound challenges to EU democratic, rule of law and fundamental rights standards currently covering the Schengen governance framework. The EES appears to contradict the well-established EU law requirement according to which access to personal data should always be proportionate, narrowly targeted and triggered by a suspicion as to a specific person.

Effective complaint mechanism should be established in order to allow individuals to access and obtain remedies in case of abuses. The possibility to lodge individual complaints should also be granted against abuses which might be committed through the deployment of smart border checks and infrastructures.

¹⁷⁷ Preamble 8 EBCG Regulation.

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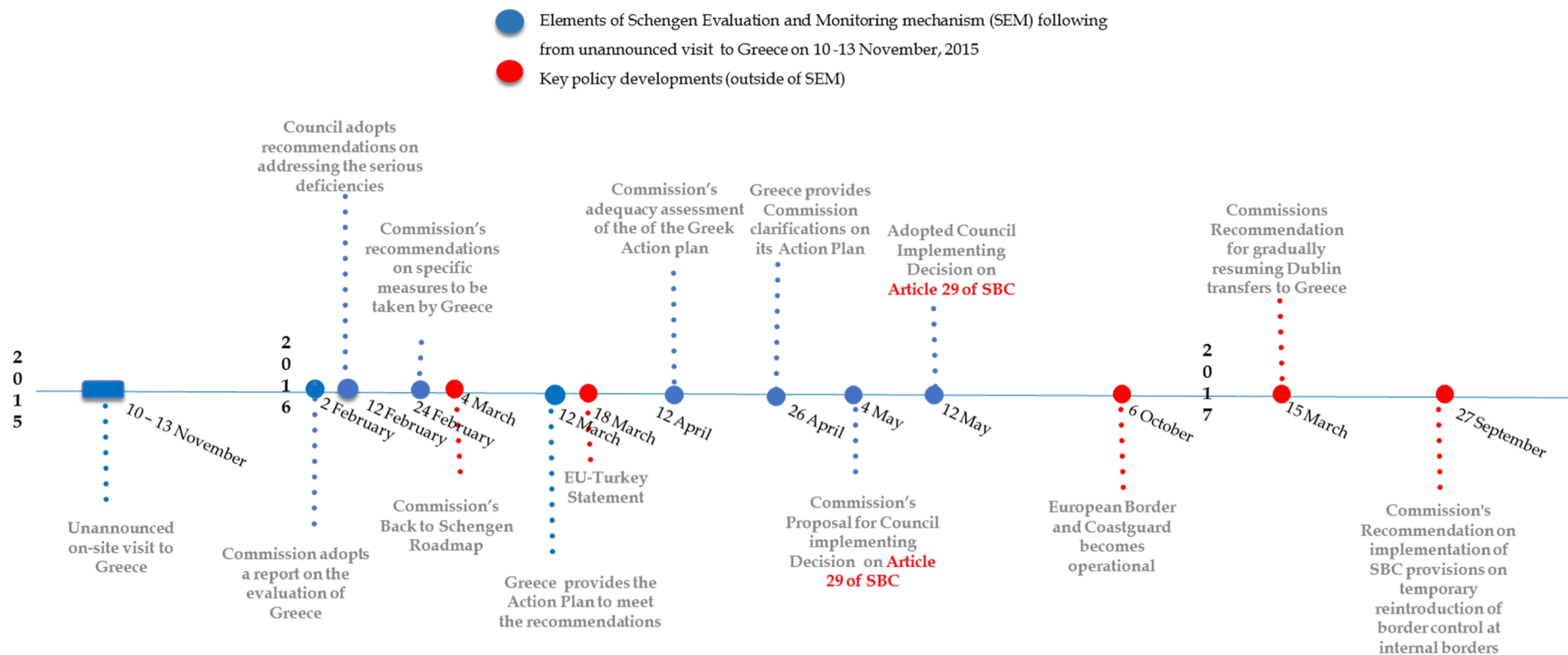
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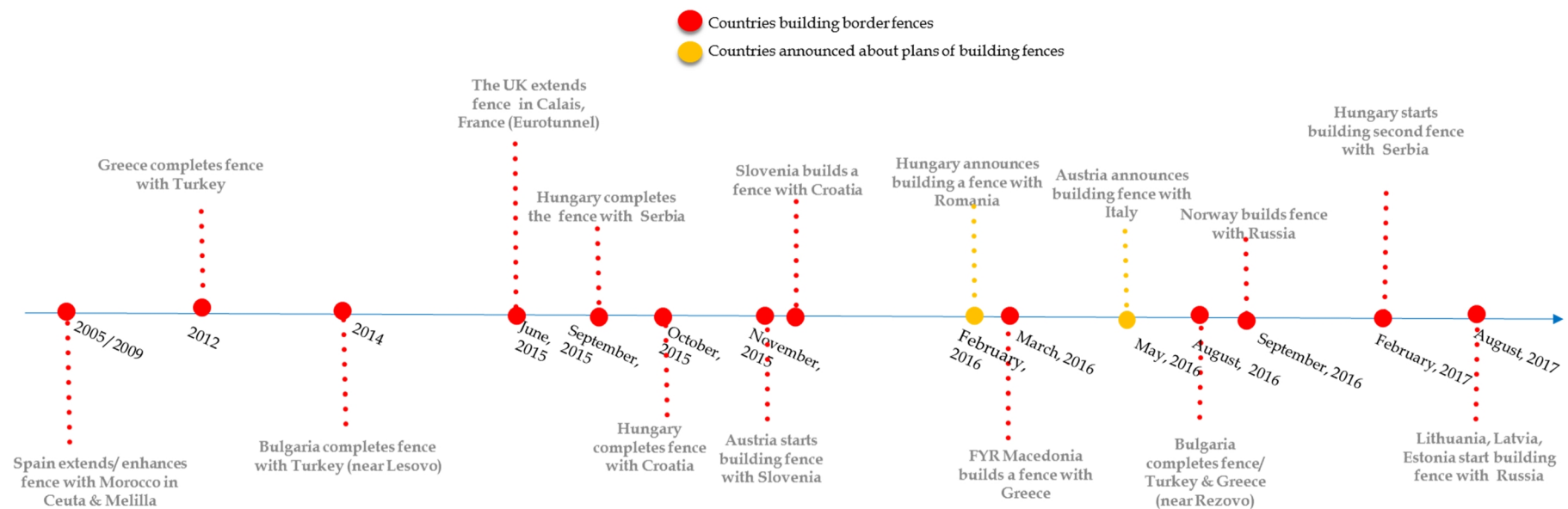
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ANNEX 1. UPDATED TIMELINE OF THE DEVELOPMENTS COVERED IN THE INITIAL STUDY



ANNEX 2. CHRONOLOGY OF THE SETTING UP OF FENCES AT THE EXTERNAL AND INTERNAL SCHENGEN BORDERS



ANNEX 3. ANALYSIS OF SCHENGEN STATE NOTIFICATIONS ON THE REINTRODUCTION OF BORDER CONTROLS AT THE INTERNAL BORDERS OF THE SCHENGEN AREA (UPDATED), SEPTEMBER 2015 – DECEMBER 2017

This is an update of the Analysis contained in Annex 3 of the 2016 study¹⁷⁸ conducted for the European Parliament. The analysis conducted on Schengen States' notifications between September 2015 and May 2016 are attributable to the authors of the previous study.

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 10 days	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</i>
26.9.2015-15.10.2015 20 days	Articles 23 & 24 SBC 2006 (prolongations – 18.11.2015, 15.02.2016, 16.3.2016) Article 29(2) SBC (notifications – 13.5.2016, 25.11.2016, 13.2.2017, 12.5.2017) No legal basis specified in notification 13.10.2017	
16.10.2015-4.11.2015 20 days	Reasons	
5.11.2015-15.11.2015 11 days	<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 	
16.11.2015-16.3.2016		

¹⁷⁸ Guild et al. (2016) Study for the European Parliament, PE 571.356 "Internal border controls in the Schengen area: Is Schengen crisis-proof?", Brussels.

Duration	Grounds & Scope	References
120 days 16.03.2016- 15.05.2016 60 days 16.05.2016- 12.11.2016 180 days 12.11.2016- 11.02.2017 90 days 11.02.2017- 11.05.2017 90 days 11.05.2017- 11.11.2017 180 days 12.11.2017- 11.05.2018 180 days	<p>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 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' 	<p><i>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 13127/15, 16.10.2015</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).</i> Brussels, Council document 14211/15, 18.11.2015 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).</i> Brussels, Council document 6071/16, 15.02.2016 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).</i> Brussels, Council document 7136/16, 16.3.2016. 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</i>

Duration	Grounds & Scope	References
	<ul style="list-style-type: none"> ▪ '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 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) ▪ '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 13.5.2016) ▪ 'On 11 November 2016 the Council adopted, on the basis of a Commission proposal, an Implementing Decision setting out a Recommendation for temporary internal border control in exceptional circumstances putting the overall function of the Schengen area at risk. [...] The Republic of Austria will apply this Implementing Decision accordingly, enabling temporary border controls [...] for a maximum time period of three months.' (prolongation notification 25.11.2016) ▪ 'On 7 February 2017, the Council of the European Union, upon proposal by the European Commission, adopted 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. The Republic of Austria will accordingly implement this Decision, which allows for temporary border controls [...] for a maximum time period of three months.' (prolongation notification 13.2.2017) ▪ 'On 11 May 2017, the Council of the European Union, upon proposal by the European Commission, adopted a further 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. The Republic of Austria will accordingly purposefully implement this Implementing Decision, which make possible temporary border controls [...] for a period of six months.' (prolongation notification 12.5.2017) ▪ 'The European Commission has announced that the Commission will not be able to present a new proposal to the Council of the European Union concerning the extension of internal border controls. Some Member States have suffered severe terror attacks. The security situation in the European Union continues to be tense. [...] Still a deficit in the protection of the external borders as well as a considerable amount of illegal secondary migration within the Schengen area continues to exist. A serious threat to the public order and security comes 	<p><i>governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 8947/16, 13.5.2016</p> <ul style="list-style-type: none"> ▪ Austrian delegation (2016) <i>Prolongation of the 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 borders (Schengen Borders Code)</i>. Brussels, Council document 14879/16, 25.11.2016 ▪ Austrian delegation (2017) <i>Prolongation of the 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 borders (Schengen Borders Code)</i>. Brussels, Council document 6252/17, 13.2.2017 ▪ Austrian delegation (2017) <i>Prolongation of the temporary reintroduction of border controls at the Austrian internal borders in accordance with the Council Implementing Decision (EU) 2017/818</i>. Brussels, Council document 9147/17, 12.5.2017 ▪ Austrian delegation (2017) <i>Prolongation of the temporary reintroduction of border controls at the Austrian internal borders in accordance with Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)</i>. Brussels, Council documents 13207/17, 13.10.2017 and Council document 13207/17 ADD 1, 18.10.2017

Duration	Grounds & Scope	References
	<p>from this uncontrolled illegal migration. Austria is still facing a large number of unregistered asylum seekers. [...] Considering the current situation at the Austrian-Hungarian and the Austrian-Slovenian border the present instruments do not constitute a sufficient substitute for temporary border controls. [...] Therefore I have decided that internal border controls [...] will be carried for 6 month beyond the 11th of November 2017.' (prolongation notification 13.10.2017)</p> <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>'Austrian-Hungarian land border and Austrian-Slovenian land border' (prolongation notifications 13.05.2016, 25.11.2016 and 13.10.2017)</p> <p>'Austrian borders with Hungary and Slovenia' (prolongation notification 13.02.2017)</p> <p>'Austrian land borders with Hungary and Slovenia' (prolongation notification 12.5.2017)</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-negligible 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 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 	<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 Article 25 of Regulation (EC) 562/2006</i>

Duration	Grounds & Scope	References
	<p>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>establishing a Community Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code).</i> Brussels, Council document 7873/16, 13.4.2016</p>
DENMARK		
<p>04.01.2016-03.04.2016</p> <p><90 days</p> <p>04.04.2016-03.05.2016</p> <p>30 days</p> <p>04.05.2016-02.06.2016</p> <p>30 days</p> <p>12.05.2016-12.11.2016</p> <p>180 days</p> <p>12.11.2016-11.02.2017</p> <p>90 days</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 2.6.2016, 25.11.2016, 15.2.2017, 19.5.2017)</p> <p>Articles 25 & 27 SBC (prolongation notification 12.10.2017)</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 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 	<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).</i> Brussels, Council document 5021/16, 5.1.2016 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 5247/16, 14.1.2016 Danish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with</i>

Duration	Grounds & Scope	References
11.02.2017- 11.05.2017 <i>90 days</i> 11.05.2017- 11.11.2017 <i>180 days</i> 12.11.2017- 11.05.2018 <i>180 days</i>	<p>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 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><i>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 5786/16, 3.2.2016</i></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). Brussels, Council document 6440/16, 23.2.2016</i> ▪ Danish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Article 23 and 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 6754/16, 4.3.2016</i> ▪ Danish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Article 23 and 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 7499/16, 1.4.2016</i> ▪ 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>

Duration	Grounds & Scope	References
	<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) ▪ 'On 11 November 2016, the Council of the European Union adopted an implementing decision setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk. [...] Denmark will apply the implementing decision, which allows temporary border checks [...] for a maximum period of three months, starting from the day of the adoption of the Decision.' (prolongation notification 25.11.2016) ▪ 'On 7 February 2017, the Council of the European Union adopted an implementing decision setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk. [...] Denmark will apply the implementing decision, which allows temporary border checks [...] for a maximum period of three months, starting from the day of the adoption of the Decision.' (prolongation notification 15.2.2017) ▪ 'On 11 May 2017, the Council of the European Union adopted an implementing decision setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk. [...] Denmark will apply the implementing decision, which allows temporary border controls [...] for a maximum period of six months, starting from the day of the adoption of the Decision.' (prolongation notification 19.5.2017) ▪ 'The many failed, foiled and completed terrorist attacks carried out in EU Member States in 2016 and 2017 have demonstrated [...] that terrorist groups are likely to try to take advantage of deficiencies in our border controls [...]. The persistent shortcomings and structural deficiencies at the EU external borders [...] facilitate significant irregular secondary migration within the 	<p>Brussels, Council document 8571/16, 3.5.2016</p> <ul style="list-style-type: none"> ▪ 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 ▪ Danish delegation (2016) <i>Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 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 14876/16, 25.11.2016 ▪ Danish delegation (2017) <i>Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 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 6366/17, 15.2.2017 ▪ Danish delegation (2017) <i>Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with the Council Implementing Decision (EU) 2017/818</i>. Brussels, Council document 9512/17, 19.5.2017 ▪ Danish delegation (2017) <i>Prolongation of the temporary reintroduction of border controls at the Danish internal borders in accordance with Articles 25 and 27 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders</i>

Duration	Grounds & Scope	References
	<p>Schengen area, which constitutes a real threat to the public order and internal security in our societies. Furthermore, the large number of irregular migrants and failed asylum seekers present in our neighbouring countries that are waiting to be returned to their country of origin or transit poses a real security threat, as there is a risk that some terrorist group will exploit their vulnerable situation.' (prolongation notification 12.10.2017)</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 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> <p>'Danish ports with ferry connections to Germany and at the Danish-German land border' (prolongation notifications 2.6.2016, 25.11.2016, 15.2.2017, 19.5.2017)</p> <p>Prolongation notification 12.10.2017 does not specify the concrete scope of the internal border controls.</p>	<p>(<i>Schengen Borders Code</i>). Brussels, Council document 13141/17, 12.10.2017</p>
FRANCE		
<p>13.11.2015 – 13.12.2015 30 days</p> <p>14.12.2015 – 27.04.2016 <90 days</p> <p>27.04.2016 – 26.05.2016 30 days</p>	<p>Legal basis</p> <p>Articles 23 & 24 SBC 2006 (notification of 22.10.2015, prolongations - 10.12.2015, 11.02.2016, 29.03.2016)</p> <p>Prolongation notification of 29.3.2016 explicitly cites Articles 23(3) and 23a SBC 2006;</p> <p>Articles 25 & 26 SBC (prolongation notification of 26.04.2016);</p> <p>Articles 25 & 27 SBC (notifications of 27.05.2016, 27.7.2016, 10.1.2017, 21.6.2017);</p> <p>Reasons</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 and 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, 13171/15, 22.10.2015. French delegation (2015), <i>Prolongation of temporary reintroduction of border controls at the French internal borders in accordance with</i>

Duration	Grounds & Scope	References
27.05.2016 – 26.07.2016 30 days	<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) 	<p><i>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 15181/15, 10.12.2015</i></p>
27.07.2016 – 26.01.2017 180 days	<ul style="list-style-type: none"> '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) 	<ul style="list-style-type: none"> 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). Brussels, Council document 5981/16, 11.02.2016</i>
27.01.2017 – 15.07.2017 < 180 days	<ul style="list-style-type: none"> '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) 	<ul style="list-style-type: none"> 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). Brussels, Council document 7360/1/16, 29.03.2016</i>
16.07.2017 – 31.10.2017 < 120 days	<ul style="list-style-type: none"> '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). 	<ul style="list-style-type: none"> 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 borders (Schengen Borders Code), Council document 8217/16, Brussels, 26.04.2016.</i>
01.11.2017 – 30.04.2018 180 days	<ul style="list-style-type: none"> '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.' (notification 27.05.2016) 'Tragically, the attack in Nice on 14 July confirms the ongoing threat of terrorism faced by France. [...] As evidenced by the attacks of 13 November 2015, crossing the external and internal borders of the Schengen area is part of the terrorist groups' strategy, which sometimes involves preparing attacks in one Member State from the territory of another Member State. [...] The current migratory situation reinforces the link between the terrorist threat and the crossing of borders.' (notification 27.7.2016) 'Against this background, the French Government decided to draft a bill extending the state of emergency until 15 July 2017, which was adopted by 	<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). Brussels, Council document 9506/16, 27.05.2016.</i>

Duration	Grounds & Scope	References
	<p>Parliament. It has been confirmed that crossing the external and internal borders of the Schengen area is part of the terrorist groups' strategy, which often involves preparing attacks in one Member State from the territory of a neighbouring Member State. Moreover, the current situation reinforces the link between the terrorist threat and the crossing of borders owing to the geographical proximity of migratory routes to the regions at the source of the terrorist threat [...]' (notification 10.1.2017)</p> <ul style="list-style-type: none"> 'The attacks on 13 November 2015, followed by the implementation of the state of emergency, the organisation of major sporting events on national territory, the attack in Nice on 14 July 2016 and the persistence of the terrorist threat led the government to reintroduce controls at France's internal borders, for various reasons, from 13 November 2015 until 26 July 2016 and then from 27 July 2016 until 15 July 2017. The various attacks on national territory, in particular the attacks in Nice on 14 July 2016 and recently in Paris, as well as those in the UK, show that the terrorist threat remains acute. [...] Against this background, the French Government decided to draft a bill extending the state of emergency until 31 October 2017.' (notification 21.6.2017) 'Since the Paris attack on 13 November 2015 and the Nice attacks perpetrated on 14 July 2016, the terrorist threat has remained high on the French territory. This has been demonstrated by the attacks of the last months in Paris, in front of the Louvre museum on February 3rd, on the Champs-Élysées on April 20th, on the esplanade of the cathedral Notre-Dame on June 6th, and the 1st of October in front of the Saint-Charles train station in Marseille. [...] Faced with the terrorism threat which remains significant, the French government took measures in order to reinforce the means at its disposal. [...] The bill on internal security and fight against terrorism, which was adopted by the National Assembly on the 3rd of October [...]. That is why, in the context of the high terrorism risk, and as a complement to the other measures aiming at fighting terrorism described above, France will renew its border controls [...]' (notification 6.10.2017) <p>Scope General scope - 'internal borders with Belgium, Luxembourg, Germany, the Swiss Confederation, Italy and Spain, and at the air borders' (all notifications of the French delegation) NB: reintroduction of border controls prolonged from the re-imposition initially linked to COP21, then prolongation was linked to Paris attacks. Finally, the French authorities have re-started the procedure of notifications on 27 of May, 2016, with</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 11514/16, 27.7.2016. French delegation (2017), <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 5055/17, 10.1.2017. French delegation (2017), <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 10365/17, 21.6.2017. French delegation (2017), <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 12933/17, 6.10.2017.

Duration	Grounds & Scope	References
	a new foreseeable threat due to UEFA Euro 2016 and Tour de France sporting events and inter-related terrorist threat.	
GERMANY		
13.09.2015-22.09.2015	Legal basis Art. 25 SBC 2006	<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>. Brussels, Council document, 12985/15, 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, 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>.
23.09.2015-12.10.2015	Articles 23 & 24 SBC 2006	
13.10.2015-01.11.2015	Article 29 (2) SBC	
02.11.2015-13.11.2015	Article 25 SBC	
<60 days	Reasons <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) 	
14.11.2015-13.05.2016	<ul style="list-style-type: none"> '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 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) 	
<180 days	<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 	
13.05.2016–12.11.2016		
180 days		
12.11.2016-11.02.2017		
90 days		
12.02.2017-11.05.2017		
90 days		
12.05.2017-11.11.2017		
180 days		
12.06.2017-11.07.2017		

Duration	Grounds & Scope	References
<p>< 30 days</p> <p>12.11.2017-11.05.2018</p> <p>180 days</p>	<p>for the benefit of our citizens' (prolongation notification 13.10.2015 – NB dated 9.10.2015, received by Council SecGen 12.10.2015)</p> <ul style="list-style-type: none"> ▪ '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 to place excessive demands on our citizens and to prevent resentment' (prolongation notification 12.2.2016) ▪ 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) ▪ 'On 12 May 2016, the Council of the European Union, at the proposal of the European Commission, adopted a "Draft 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". [...] 	<p>Brussels, Council document, 13569/15, 30.10.2015.</p> <ul style="list-style-type: none"> ▪ 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. ▪ 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 14880/16, 25.11.2016. ▪ German delegation (2017), <i>Prolongation of the temporary reintroduction of border controls at the German internal borders in accordance with Articles 29 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 6255/17, 13.2.2017. ▪ German delegation (2017), <i>Prolongation of the temporary reintroduction of border controls at the German internal borders in accordance with the Council Implementing Decision (EU)</i>

Duration	Grounds & Scope	References
	<p>the Federal Republic of Germany will apply the Implementing Decision, which allows temporary border checks [...] for a maximum period of six months, starting from the day of the adoption of the Decision by the Council.’ (prolongation notification 13.05.2016; similar reasons for prolongation notifications 21.11.2016, 13.2.2017, 12.5.2017)</p> <ul style="list-style-type: none"> ▪ ‘Due to the higher security requirements during the G20 Summit of heads of state and government, which will take place in Hamburg from 7 to 8 July 2017, I have decided to reinstate internal border controls at Germany’s Schengen borders [...]’. (notification 18.5.2017) ▪ N.B. Notification of the German delegation of 18.5.2017 does not indicate the period of temporary internal border controls. This period is subsequently notified in the German delegation’s notification of 9.6.2017 (i.e. 12 June – 11 July 2017). ▪ ‘The European Commission announced that it will not be able to present another proposal on prolonging internal border controls to the Council of the European Union. Germany and other European Member States have witnessed dramatic terrorist attacks. The European security situation remains tense. [...] Shortcomings in the protection of the external borders and significant irregular migration creates serious threats to public security and order.’ (notification 12.10.2017) ▪ N.B. Notification of the German delegation of 12.10.2017 reinstated temporary internal border controls for a time period of six months. Subsequent German notification of 15.12.2017 seems to imply that Germany intends to continuously invoke temporary internal border control periods of 30 days, up to the maximum of six months. <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> <p>‘the German-Austrian borders’ (prolongation notifications 13.05.2016)</p> <p>‘the German-Austrian land border’ (prolongation notification 25.11.2016, 13.2.2017, 12.5.2017, 12.10.2017)</p> <p>‘at Germany’s land, air and sea borders [...]’, though not further specified (notification 18.5.2017)</p>	<p>2017/818. Brussels, Council document 9145/17, 12.5.2017.</p> <ul style="list-style-type: none"> ▪ German delegation (2017), <i>Temporary reintroduction of border controls at the German internal borders in accordance with Article 25 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 9006/17, 18.5.2017. ▪ German delegation (2017), <i>Temporary reintroduction of border controls at the German internal borders in accordance with Article 25 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 10186/17, 9.6.2017. ▪ German delegation (2017), <i>Prolongation of the temporary reintroduction of border controls at the German internal borders in accordance with Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)</i>. Brussels, Council document 13142/17, 12.10.2017. ▪ German delegation (2017), <i>Prolongation of the temporary reintroduction of border controls at the German internal borders in accordance with Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)</i>. Brussels, Council document 15828/17, 15.12.2017.
ITALY		

Duration	Grounds & Scope	References
10.05.2017- 30.05.2017 <30 days	Legal basis Article 25 SBC Reasons <ul style="list-style-type: none"> '[...] security needs related to the development of the G7 Summit that will be held in Taormina from 26 to 27 of May 2017' Scope <ul style="list-style-type: none"> 'All the national internal borders' 	<ul style="list-style-type: none"> Italian delegation (2017), <i>Temporary reintroduction of border controls at the Italian borders in accordance with Article 25 of Regulation (EU) 2016/399 on a Union Code on the rules of the governing the movement of persons across borders (Schengen Borders Code)</i>. Brussels, Council document 8182/17, 11.4.2017.
MALTA		
09.11.2015- 13.11.2015 21.11.2015- 29.11.2015 <30 days 21.01.2017- 09.02.2017 < 30 days	Legal basis Article 23 et seq SBC Reasons <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) NB. The initial Maltese delegation's notification of 16.10.2015 noted the intention of reintroduction temporary internal border controls from 4 November to 3 December 2015. The subsequent notification of 6.11.2015 amended these dates to 9-13 November 2015 and 21-29 November 2015. '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 situation of instability facilitates the promulgation of extremist ideology across the territory' (report 26.02.2016) 	<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 Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 15366/15, 16.12.2015. Maltese delegation (2016) <i>Report on the temporary reintroduction of border controls at</i>

Duration	Grounds & Scope	References
	<ul style="list-style-type: none"> 'On 3 February 2017, the Malta Informal Summit 2017 will be held in Malta. The Joint Valetta Action Plan Senior Officials Meeting will then be held in Malta on 8-9 February 2017. The Malta Informa Summit will be a major event [...]. The Joint Valetta Action Plan Senior Officials Meeting will also be a major event [...]. In addition to this, the past event which have been experienced in different parts of the European Union demonstrate the heightened security risk that currently prevails.' (notification 20.1.2017) <p>Scope</p> <ul style="list-style-type: none"> Malta International Airport Valletta Sea Passenger Terminal 	<ul style="list-style-type: none"> <i>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). Brussels, Council document 6514/16, 26.2.2016</i> Maltese delegation (2017), <i>Reintroduction of temporary border controls at the Maltese air and sea 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). Brussels, Council document 5206/17, 20.1.2017</i>
NORWAY		
26.11.2015-06.12.2015 (10 days) 15.01.2016 (60 days Art. 25) 15.01.2016-12.05.2016 (120 days, Art. 24) 12.05.2016-11.06.2016 (30 days, Art. 26) 12.05.2016-11.11.2016 180 days	<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 notifications 10.06.2016, 11.11.2016, 13.2.2017)</p> <p>Council Implementing Decision 2017/818 (prolongation notification 17.5.2017)</p> <p>Article 25 SBC (notification 25.8.2017)</p> <p>Article 25 & 27 SBC (prolongation notification 13.10.2017)</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 	<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). Brussels, 14633/15, 25.11.2015</i> 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). Brussels, 14996/15, 04.12.2015</i> 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
12.11.2016-11.02.2017 90 days 12.02.2017-11.05.2017 90 days 12.05.2017-11.11.2017 180 days 26.08.2017-25.09.2017 30 days 12.11.2017-11.05.2018 180 days	<p>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 [...] 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). 	<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 with 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 with 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 with 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 with 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. Norwegian delegation (2016), <i>Prolongation of the temporary reintroduction of border</i>

Duration	Grounds & Scope	References
	<ul style="list-style-type: none"> ▪ 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 internal borders under Art.24' (NB. Council wrongly referred to new article 26 instead 27). ▪ 'On May 12, the council of the European Union, at the proposal of the European Commission, adopted the Recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk. [...] Norway will apply the recommendation set out in the Implementing Decision, which allows temporary border checks [...] for a maximum period of six months, starting from the day of the adoption of the Decision by the Council.' (prolongation notification 10.06.2016; similar reasons for prolongation notifications 11.11.2016, 13.2.2017 and 17.5.2017) ▪ 'During and on the days before the upcoming UCI Road World Championships in Bergen from the 16th until the 24th of September [...]. Events like the aforementioned Championships are known to attract spectators with alternative motivations, hereunder terrorists. Hosting the World Championships in itself poses a serious threat to internal security, and calls for reintroduction of border controls at the relevant internal air border.' (notification 25.8.2017) ▪ 'The European Commission announced that it will not be able to present another proposal on prolonging internal border controls to the Council of the European Union. The terrorist threat in Europe is a grave concern, and the European security situation remains tense. [...] Shortcomings in the protection of the external borders and significant irregular secondary migration within the Schengen area persist. This uncontrolled irregular migration creates serious threats to public security and order, with a risk of persons suspected of having terrorist intentions posing as refugees.' (notification 13.10.2017) <p>Scope</p> <p>'The border control may extend to all internal borders, i.e. 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</p>	<p><i>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.</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 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. ▪ 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 14386/16, 11.11.2016. ▪ Norwegian delegation (2017), <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 6257/17, 13.2.2017. ▪ Norwegian delegation (2017), <i>Prolongation of the temporary reintroduction of border controls at the Norwegian internal borders in accordance with the Council Implementing Decision (EU) 2017/818.</i> Brussels, Council document 9382/17, 17.5.2017 ▪ Norwegian delegation (2017), <i>Temporary reintroduction of border controls at the Norwegian air border in accordance with Article 25 of Regulation (EU) 2016/399 on a Union</i>

Duration	Grounds & Scope	References
	<p>12.02.2016 notification mentioned that there have been no negative reactions from the public.'</p> <p>'[...] at the Norwegian ports with ferry connections to Sweden, Denmark and Germany' (prolongation notifications 10.6.2016, 11.11.2016, 13.2.2017, 17.5.2017)</p> <p>'[...] at Bergen airport' (notification 25.8.2017)</p> <p>'[...] at the Norwegian ports with ferry connections to Denmark, Germany and Sweden [...]. Additional internal border controls at air- and land borders are subject to ongoing assessment of the threats to the internal security.' (prolongation notification 13.10.2017)</p>	<p><i>Code on the rules of the governing the movement of persons across borders (Schengen Borders Code)</i>. Brussels, Council document 11734/17, 25.8.2017</p> <ul style="list-style-type: none"> Norwegian delegation (2017), <i>Prolongation of the temporary reintroduction of border controls at the Norwegian internal borders in accordance with Articles 25 and 27 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)</i>. Brussels, Council document 13205/17, 13.10.2017.
POLAND		
<p>04.07.2016-02.08.2016</p> <p><30 days</p>	<p>Legal basis</p> <p>Article 25 & 27 SBC</p> <p>Reasons</p> <ul style="list-style-type: none"> 'In connection with the necessity to ensure internal security and public order during the Summit of the North Atlantic Treaty Organization (8-9 July 2016), World Youth Days (25-31 July 2016) and the pilgrimage of the Holy Father to Poland (28-31 July 2016) [...].' <p>Scope</p> <ul style="list-style-type: none"> '[...] at the state border sections with the Federal Republic of Germany, the Czech Republic, the Slovak Republic, and the Republic of Lithuania as well as at sea and air border crossing points.' 	<ul style="list-style-type: none"> Polish delegation (2017), <i>Temporary reintroduction of border controls at the Polish internal borders in accordance with Article 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 9991/16, 8.6.2016.
PORTUGAL		
<p>10.05.2017-14.05.2017</p> <p><10 days</p>	<p>Legal basis</p> <p>Article 25 & 26 SBC</p> <p>Reasons</p>	<ul style="list-style-type: none"> Portuguese delegation (2017), <i>Temporary reintroduction of border controls at the Portuguese 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
	<ul style="list-style-type: none"> 'In connection with the necessity to ensure internal security and public order during the pilgrimage of the Holy Father to Fatima-Portugal (12 and 13 May 2017 [...]'. <p>Scope</p> <ul style="list-style-type: none"> Scope of temporary internal border controls is not specified in detail, Portuguese delegation's notification refers to 'the border controls [that] may extend to all internal border, including land sea and air borders, and its scope and intensity will remain limited to what is strictly necessary to respond to the threat to public order and internal security. During this period, crossing of the internal land border of Portugal will be allowing in the following authorized crossing points: [...]'. 	<p><i>borders (Schengen Borders Code)</i>. Brussels, Council document 7967/17, 3.4.2017.</p>
SLOVENIA		
17.9.2015- 26.9.2015 27.9.2015- 16.10.2015 <30 days	<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) '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) 	<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>. Brussels, Council document, Council document, 12418/15, 25.09.2015. 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</i>

Duration	Grounds & Scope	References
	<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 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>	<p><i>Code</i>). Brussels, Council document, 13170/15, 20.10.2015.</p> <ul style="list-style-type: none"> ▪ 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
SWEDEN		
12.11.2015-09.01.2016 <60 days	Legal basis Articles 23 & 25 SBC 2006 (notification 12.11.2015, prolongation 20.11.2015, 11.12.2015, 18.12.2015, 07.01.2016)	<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.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.
10.01.2016-08.04.2016 <90 days	Articles 23 & 24 SBC 2006 (prolongation 08.02.2016, 08.03.2016, 08.04.2016) Articles 25 & 27 SBC 2006 (prolongation notification 04.05.2016)	
09.04.2016-08.05.2016	Article 29(2) SBC (prolongation notifications 06.06.2016, 21.11.2016, 15.2.2017)	
30 days	Article 28 SBC (notifications 19.4.2017, 15.11.2017)	
09.05.2016-07.06.2016	Council Implementing Decision 2017/818 (prolongation notification 17.5.2017)	
30 days	Article 25 SBC (prolongation notification 13.10.2017)	
08.06.2016-11.11.2016 180 days	Reasons <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 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	
12.11.2016-11.02.2017		
90 days		
12.02.2017-11.05.2017		
90 days		
07.04.2017-14.04.2017		
<10 days		
12.05.2017-11.11.2017		

Duration	Grounds & Scope	References
180 days 12.11.2017- 11.05.2018 180 days 12.11.2017- 19.11.2017 <10 days	<p>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 deter[iorate]' (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 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 notification 06.06.2016; similar reasons for prolongation notifications 21.11.2016, 15.2.2017, 17.5.2017) 'Due to the suspected terror attack in Stockholm on 7 April 2017, the Swedish Policy Authority the same day decided to reintroduce border controls at the Swedish internal borders. [...] Following the development of events, the Swedish Policy Authority has informed the Swedish Government that as of 15 April 2017 there will no longer be a need for border controls at the internal borders.' (notification 19.4.2017) 	<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 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 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 6886/16, 08.03.2016. 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 7716/16, 08.04.2016. 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</i>

Duration	Grounds & Scope	References
	<ul style="list-style-type: none"> ▪ '[...] due to the continuous serious threat to public policy and internal security, the Swedish government intends to take a decision on the temporary reintroduction of border controls at the Swedish internal borders. [...] The European Commission has announced that it will not be able to present another proposal on prolonging internal border controls once the current Recommendation expires in November. However, the serious threat to public policy and internal security remains. The Swedish Security Service has come to the conclusion that the threat level remains the same as on 7 April 2017 when Stockholm witnessed what is considered a terrorist attack. Shortcomings in the protection of the external borders persist and contribute to this threat, as they enable potential terrorists and other criminals to enter the Schengen territory unnoticed.' (notification 13.10.2017) ▪ 'On Friday 10 November 2017 the Swedish Policy Authority decided to reintroduce border controls at the Swedish internal borders. [...] The reason for the Police Authority's decision is the risk of unrest and serious disorder in connection to the Social Summit for Fair Jobs and Growth. On 17 November the summit will gather heads of state and government as well as over 30 organisations and actors.' (notification 15.11.2017) <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'. (all Swedish notifications except for notifications 19.4.2017, 13.10.2017, and 15.11.2017)</p> <p>Scope of internal border controls are not specified in the notifications of 19.4.2017 and 13.10.2017</p> <p>'Border checks will be carried out [...] at Gothenburg Landvetter Airport and at Svinesund on the border between Sweden and Norway.' (notification 15.11.2017)</p>	<p><i>a Union Code on the rules governing the movement of persons across Schengen borders (Schengen Borders Code)</i>. Brussels, Council document 8827/16, 12.05.2016.</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 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)</i>. Brussels, Council document 8667/16, 04.05.2016. ▪ 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 (Schengen Borders Code)</i>. Brussels, Council document 9865/16, 06.06.2016. ▪ 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 (Schengen Borders Code)</i>. Brussels, Council document 14680/16, 21.11.2016. ▪ Swedish delegation (2017), <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 (Schengen Borders Code)</i>. Brussels, Council document 6258/17, 15.2.2017. ▪ Swedish delegation (2017), <i>Temporary reintroduction of border controls at the Swedish internal borders in accordance with</i>

Duration	Grounds & Scope	References
		<p><i>Article 28 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). Brussels, Council document 8319/17, 19.4.2017.</i></p> <ul style="list-style-type: none"> ▪ Swedish delegation (2017), <i>Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with the Council Implementing Decision (EU) 2017/818. Brussels, Council document 9379/17, 17.5.2017.</i> ▪ Swedish delegation (2017), <i>Prolongation of the temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 25 of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). Brussels, Council document 13203/17, 13.10.2017.</i> ▪ Swedish delegation (2017), <i>Temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 28(1) of Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). Brussels, Council document 14407/17, 15.11.2017.</i>

Abstract

This Study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Civil Liberties, Justice and Home Affairs (LIBE-Committee), takes stock of the main developments that have occurred in the Schengen Governance Framework since 2016. It analyses the legitimacy of a number of States' decisions to maintain internal border controls. Also, most recent policy proposals in the field of internal police checks are assessed in light of relevant EU legal standards. The paper also questions the legality of the border walls and fences, which have been recently erected at the EU external borders and within the Schengen area.

DISCLAIMER

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