

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law



CM2011 Meijers Committee Recommendations for a new Strategy on the Future of Schengen

November 2020¹

The European Commission emphasizes in its new Pact on Migration and Asylum that effective management of EU external borders is a key element of a Schengen area without internal borders. To ensure a 'well-functioning Schengen area', the Commission announces, in section 4.4, the presentation of a new Strategy on the future of Schengen, including 'initiatives for a stronger and more complete Schengen'. In this contribution, the Meijers Committee focuses on four subjects which need further development in this new strategy:

1. The temporary reintroduction of internal border controls.
2. The Schengen evaluation mechanism.
3. Controls in the territory.
4. The enlargement of the Schengen area.

1. Temporary reintroduction internal border controls

In response to refugee and migration flows in 2015 and 2016, but also in reaction to terrorist attacks in several European cities, Member States have repeatedly reintroduced internal border controls, with reference to the provisions of the Schengen Borders Code (SBC). Since 2015, these controls have been extended several times.² This has resulted in a quasi-permanent reintroduction of controls at parts of the internal borders. In 2020, the COVID-19 pandemic triggered both the reintroduction of new internal border controls, as well as the prolongation of existing internal border controls.

This practice undermines the essence of the Schengen space as an area without internal border controls, provided for in Article 3(2) TEU, Article 67(2) TFEU and the provisions of Protocol (No 19) on the Schengen *acquis*. It is also in clear contravention of the provisions of the SBC that regulate in secondary law the exceptions to the absence of border controls. These provisions emphasize that the reintroduction of internal border controls is only allowed as a measure of *last resort* and of a *temporary nature* and if *necessary* to counter threats to public policy or internal security, respecting the principle of proportionality.

¹ This note is part of a series of the Meijers Committee commenting on the Commission's New Pact on Migration and Asylum, COM(2020) 609 final. Please find all our comments on www.commissie-meijers.nl.

² Guild, E. et al, *Internal border controls in the Schengen area: Is Schengen crisis-proof?* (Report for the LIBE-Committee of the European Parliament), June 2016:
http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571356/IPOL_STU%282016%29571356_EN.pdf.

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law

Notwithstanding legitimate concerns of the Member States for public policy or internal security, and more recently public health, the extent and duration of the reintroduction of internal border controls is neither proportionate nor necessary. In addition, the Court of Justice of the European Union (CJEU) has clearly held that a Member State cannot simply invoke Article 72 TFEU, without proving that recourse to that article is necessary for the exercise of its responsibilities for the maintenance of law and order or internal security.³ With respect to Article 4(2) TEU, the CJEU has held that the reference to national security goes beyond objectives of combating crime in general, even serious crime, and of safeguarding public security.⁴ Threats to national security can be distinguished, by their nature and particular seriousness, from the general risk that tensions or disturbances, even of a serious nature, affecting public security will arise.⁵

The Meijers Committee regrets that there are no (publicly) available reports informing the Council and Parliament, and no Commission opinions on the reinstatement of internal border controls, as required under Article 33 SBC. The Commission should provide the necessary information which allows other Member States, the EU institutions and the general public to monitor compliance of the reinstatement of controls at the internal borders with Union law.

Furthermore, the Meijers Committee regrets the lack of enforcement action by the Commission. This has resulted in legal uncertainty for Union citizens and third-country nationals alike, as well for national administrative and judicial authorities. This is evidenced by the preliminary reference of the Austrian *Landesverwaltungsgericht* Steiermark on the reintroduction of controls at the Austrian internal borders.⁶ The Meijers Committee stresses that the enforcement of EU law in a core area of European integration is too important to be left to private persons in individual cases.

Finally, in relation to the recent reinstatement of border controls by different Member States in response to the COVID-19 pandemic, the Meijers Committee notes that the SBC lacks an explicit legal basis for the reintroduction of border controls on the ground of public health.

In light of the above, the Meijers Committee urges that a new Strategy on the future of Schengen clarifies the rules for the reinstatement of controls at the internal borders and amends the SBC to this effect.

Recommendations

- Exhaustively regulate the rules and procedures for the temporary reintroduction of internal border controls.
- List and define in more detail the possible grounds for the reintroduction of internal border controls.

³ *Commission v Poland* (relocation), case C-715/17, point 147.

⁴ *Quadrature du Net*, cases C-511/18 and C-512/18 and case C-520/18, point 136

⁵ *Ibid.*

⁶ *N.W.*, Case C-369/20, pending.

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law

- Add 'public health' as a ground for the reintroduction of internal border controls, applying the definition as provided in Article 2(21) SBC and referring to the WHO list of infectious or contagious parasitic diseases.
- Provide for a special procedure in case of prolonged threats to public order, national security or public health, and to include in this procedure:
 - sufficient safeguards to ensure that the reintroduction of internal border controls does not go beyond what is absolutely necessary;
 - the obligation for Member States to submit, after an initial period of reintroduction of border controls, a motivated request to the Commission for further prolongation⁷;
 - the obligation for a Member State to, after a fixed number of prolongations of internal border controls, submit a motivated request to the Council for further prolongation, subject to (reverse) qualified majority voting.
- Clearly state whether and if so under what conditions different grounds for the reintroduction of internal border controls may be applied cumulatively and consecutively.
- Clearly define the monitoring and information obligation of the Commission and Member States concerned, including a clear time frame.
- Make clear that controls within the territory of a Member State are to be given priority over the reinstatement of internal border checks.

2. Schengen Evaluation Mechanism

The Meijers Committee welcomes the further development of the Schengen Evaluation Mechanism (SEM) to ensure the correct and full implementation of Schengen rules and to strengthen mutual trust between Member States. Effective implementation and enforcement of the Schengen rules is key to the confidence and success of the area without internal border controls.

The Meijers Committee encourages the Commission to make the results of the review of Council Regulation (EU) No 1053/2013 based on Article 22 of that Regulation publicly available. Already at this stage, based on the experience in practice with the current mechanism, it wishes to put forward a number of suggestions for improvement.

Recommendations

- Include a general evaluation per Member State of compliance with the Schengen *acquis* rather than on selected topics only.
- Improve the overall transparency of the SEM, with due respect for sensitive information.
- Incorporate fundamental rights compliance and involve the Fundamental Rights Agency.
- Enable the Commission to determine the composition of the evaluation teams.

⁷ Cf. Article 3 in the recent proposal for the Regulation for crisis situations, COM (2020) 611 final.

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law

- Include EU experts from relevant bodies and agencies in evaluation teams, in addition to Commission and Member State experts, such as Frontex, as well as an independent expert appointed by the European Parliament.
- Allow evaluation teams to be allowed to pay unannounced on-site visits to Member States, instead of having to give a 24-hour notice as is currently required.
- Improve the follow-up to the findings of the SEM by providing for shorter and clearer deadlines on the evaluators and the Member States being evaluated.
- Empower the Commission rather than the Council to adopt recommendations on the basis of evaluations.
- Facilitate access of individual Members of the European Parliament to the evaluation reports.
- Ensure that the Commission informs both the Council and the European Parliament of the findings of the evaluation teams, as well the recommendations based thereon.
- Ensure that the Commission makes the findings of the evaluation teams, as well as the recommendations based thereon, publicly available, with due respect for sensitive information.

3. Checks within the territory

Both in the New Pact on Migration and Asylum and in the Communication on the approach for restoring the freedom of movement and lifting internal border controls in relation to COVID-19, the Commission points at the use of ‘controls based on risk assessment or local police measures’ as a viable alternative to internal border controls.⁸ It also refers to the use of ‘new technology and smart use of IT interoperability’ to make controls ‘less intrusive’.⁹ These proposals are in line with earlier recommendations and guidelines.¹⁰

The Meijers Committee emphasizes that the use of police checks and new technologies should not result in restrictions to travel for EU citizens and third-country nationals within the Schengen territory, since this would undermine the very goal of the Schengen cooperation: seamless travel within an area without internal border controls. Interoperability, or the interlinked usage of EU large-scale databases (SIS, Eurodac, VIS, EES, ETIAS and ECRIS-TCN) and the access to law enforcement authorities to administrative data on third-country nationals, coupled to new technologies of biometrics and surveillance, may result in a ‘multiplication of borders’, meaning that persons may be controlled at any time at any place: at the external borders, but also within the territory.

Furthermore, the application of police controls within the Schengen area should be in full compliance with national and European data protection standards and non-discrimination legislation. The

⁸ COM(2020) 609 final, p. 15 and C(2020) 3250 final, p. 10.

⁹ COM(2020) 609 final, *ibid.*

¹⁰ Recommendation (EU) 2017/820 of 12 May 2017 and Annex to COM(2012) 230 final.

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law

discretionary powers of police and immigration authorities inside the territory and within internal border areas, combined with the possibility to check aforementioned data systems, creates a risk that third-country nationals or those considered to be, putatively or by Union law,¹¹ will be more often stopped for identification and comparison of their (biometric) data. Consequently, they may be confronted with disproportionate or arbitrary barriers of entry, expulsion, or law enforcement measures. Research carried out in the Dutch border area identified a clear risk of discrimination and racial profiling by police and border guards when controlling individuals during mobile spot checks.¹²

In earlier comments, the Meijers Committee has expressed its concerns with regard to the use and possible discriminatory effects of large-scale databases such as SIS, VIS, ETIAS and ECRIS-TCN, and the framework of interoperability, not only at the external borders but also within the Schengen territory.¹³ In this regard, the Meijers Committee refers to the report on the use of digital border technologies by the *UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance* published in November 2020. In this report, the Rapporteur expresses her concerns about the discriminatory and exclusionary effects of these digital technologies without necessary human rights safeguards. The report also describes how these measures are deployed to advance existing racially discriminatory and xenophobic ideologies, in part due to wide-spread perception that migrants and refugees are to be considered as *per se* threats to security.¹⁴

The CJEU has in a series of cases circumscribed the discretionary power of the Member States to exercise border controls in its territory.¹⁵ Nevertheless, questions remain as regards the role of private companies in carrying out checks on behalf of the Member States. In the *Touring Tours* case these checks were equated with controls within the Member States.¹⁶ However, this does not do justice to the specificity of these controls, being carried out by private operators in another Member State than the one that prescribes these controls.

¹¹ This risk will increase if the EU maintains or introduces rules similar to Article 2 of Regulation 2019/816, stating that certain Union citizens should be treated as third-country nationals, see our earlier comments CM1710, CM1711 and CM1812, available at www.commissie-meijers.nl. See also Bast, J. et al, *Human Rights Challenges to European Migration Policy* (REMAP study), October 2020, p. 108,

<http://www.migrationundmenschrechte.de/kontext/controllers/document.php/19.c/9/52276f.pdf>.

¹² Van der Woude, M. and Van der Leun, J., 'Crimmigration checks in the internal border areas of the EU: finding the discretion that matters', *European Journal of Criminology* 2017 14 (1), p. 27-45.

¹³ See our earlier comments CM1802 (interoperability) and CM1902 (ECRIS-TCN), available at www.commissie-meijers.nl.

¹⁴ UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Report A/75/590, November 2020, <https://www.ohchr.org/EN/newyork/Documents/A-75-590-AUV.docx>

¹⁵ *Melki & Abeli*, joined cases C-188/10 and C-189/10; *Adil*, case C-278/12 PPU and *A. (Europabrücke)*, case C-9/16.

¹⁶ *Touring Tours*, case C-412/17.

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law



The Meijers Committee recommends a better regulation and delimitation of police powers of the Member States in border areas. Importantly, these controls should be carried out in full compliance with EU law, including respect for fundamental rights and freedoms. To this effect the Commission should submit proposals, either of a legislative nature or in the form of guidelines.

Recommendations

- Further define the notion of ‘checks within the territory’, to delineate them from border controls.
- Further regulate the conditions under which ‘checks within the territory’ can take place in border areas.
- Specify that, to the extent to which police controls take place in border areas and are aimed at the prevention of irregular migration or illegal border crossing, the Charter of Fundamental Rights applies.
- Codify the guidance provided by the case law of the CJEU and specify more clearly what is required in terms of intensity, frequency and selectivity to distinguish police controls from border controls.
- Regulate the position of private companies when obliged to carry out controls within the territory on behalf of the Member States.
- Prevent racial profiling, invasive checks, and the abuse of discretion by requiring national authorities to develop guidelines, training programs, accessible complaint mechanisms and a system of consistent monitoring and evaluation of controls taking place within border areas.
- Ensure access to effective judicial protection for individuals with regard to actions and decision-making based on foreign SIS alerts or risk assessment, but also information as stored in other EU databases, as Eurodac, VIS, ETIAS, and ECRIS-TCN, not only at the external borders but also within the territory, including internal border areas.
- Ensure that any use of technological means complies fully with applicable national and EU data protection and non-discrimination legislation.

4. Enlargement of the Schengen Area

A new Strategy on the future of Schengen will need to address the position of Schengen candidate countries, i.e. those Member States that have acceded to the European Union, but in relation to whom there has not yet been a Council Decision taken to lift internal border checks.

Already, the Schengen evaluation mechanism plays an important role in the assessment of the readiness of the Schengen candidate countries. This role could be reinforced. Currently there are four Member States that have been declared technically ready by the Commission to join the Schengen area. A number of Member States has however blocked the adoption of a unanimous Council Decision

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law

that would allow for full accession to the Schengen area, based on political concerns in relation to the respect for the rule of law and corruption in the Member States concerned.

The Meijers Committee would like to point out that despite resolutions from the European Parliament calling for an end to this situation, the exclusion of these countries from the Schengen area continues to this very day.¹⁷ The extended stay of these countries in the ‘Schengen waiting room’ has a number of undesirable consequences.

The current situation leads to a *de facto* dual external border, a duplication of border controls, and the primacy of security measures over facilitating borderless travel in Europe. Schengen candidate countries have increasingly been allowed to participate in Schengen developing measures, notably the interoperability initiative, without benefitting from the lifting of internal border checks. This means that a number of Member States, their citizens and the third-country national legally present in their territory, are denied the benefits of the objective laid down in primary law, namely the establishment of an area without internal borders.

Schengen candidate countries guard their external borders in line with EU standards, including the relevant parts of the SBC, and are assisted in doing so by the European Border and Coast Guard Agency (Frontex). The CJEU has made it clear that participation in measures related to the external borders presupposes participation in the underlying Schengen rules, more specifically the lifting of checks at the internal borders.¹⁸

Finally, this situation creates considerable uncertainty as to the legal regime that is applicable at the external borders of the Member States that fully participate in Schengen and border a Schengen candidate country, given that internal and external borders have been defined as mutually exclusive.

Recommendations

For this reason, the Meijers Committee recommends that a new Strategy on the future of Schengen includes:

- Clear rules governing the accession to the Schengen area once a candidate Member State has acceded, comparable to the Copenhagen criteria for accession to the European Union itself.
- A path towards accession for the current Schengen candidate countries, based upon binding rules and strict conditionality.
- A clearly defined role for a revised Schengen evaluation mechanism and the vulnerability mechanism under the European Border and Coast Guard Regulation (Article 13) in order to access independently and objectively fulfillment of the criteria for accession to Schengen.

¹⁷ European Parliament Resolution of 11 December 2018 (P8_TA(2018)0497) and of 13 October 2011 (P7_TA(2011)0443).

¹⁸ *UK v Council (Frontex)*, Case C-77/05 and *UK v Council (Passports)*, Case C-137/05.

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law

- Clarification in the SBC as to the applicable legal regime at the at the external borders of a Member State fully participating in Schengen and the external borders of a Schengen candidate country.

5. Concluding remarks on recent developments

Finally, the Meijers Committee would like to briefly comment on the call put forward in November 2020 by the French President Macron for a reform of the Schengen area and closer cooperation in the area of internal security.

The Schengen flanking measures have always had a dual nature. On the one hand they comprise measures regulating visa, borders, migration and asylum, on the other they concern police cooperation and judicial cooperation in criminal matters. Although both deserve to be included in a new Strategy for the future of Schengen, it should be emphasized that the primary objective of both types of flanking measures has always been to facilitate free travel and lift internal border controls.

Although Member States may have legitimate concerns of public order and national security, it is highly doubtful that these can be addressed through the return of internal border controls. Border controls have a highly symbolic value, but are seldomly the most effective means in the fight against terrorism and organised crime, as the recent terror attacks taking place in Vienna and Paris have sadly shown. These attacks took place despite the existence of controls at the internal borders. In this regard much more emphasis should be placed on effective cooperation between law enforcement staff and the accurate and timely exchange of information, which, however should at all times respect the basic principles of criminal justice and fundamental rights.

As regards the call for a reinforcement of the external borders, the Meijers Committee recalls that a recent amendment to the founding Regulation of Frontex has already significantly reinforced the powers of this agency in the field of border management and return. It is submitted that all efforts should be on the implementation of this new mandate, and that no further legislative changes should be proposed before a thorough evaluation of the new legal framework has been carried out.