



## **SCHENGEN AT THE CROSSROADS BETWEEN DUBLIN'S FAILURE AND THE RISING POPULISM IN THE EU. CONSTITUTIONAL AND POLITICAL SCENARIOS IN THE CONTEXT OF THE CURRENT REFUGEE CRISIS**

IED Research Project: "Migration, borders control and solidarity: Schengen at stake?"

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*Abstract: The unprecedented increase of movements of migrants and refugees within the EU has triggered the reinstatement of internal border controls in several Schengen States. While the reinstatement of border controls is an established practice in the Schengen Borders Code, having been employed many times in the past, it has acquired a completely new scope and relevance in light of the current refugee crisis and has called into question the continued existence of a free movement zone within the EU. After outlining the connections between Schengen and the measures implemented or proposed at the EU level to address the refugee crisis, this paper will aim to illustrate the main constraints and threats facing the existence of a control-free internal borders area in the EU. We will argue that these constraints are both legal and political in nature, being represented on the one hand by the ill-functioning Dublin rules, and on the other hand by the growth of populism in the EU.*

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### **1. Introduction**

Alongside the monetary union, the existence of an area without internal border controls undoubtedly represents the most fortunate experience of differentiated integration in the European Union. Since its "communitarization" in 1997, the so-called Schengen area<sup>1</sup> has functioned well and its existence has scarcely been controversial, excluding some limited spots.<sup>2</sup> In this way, Schengen has been able to become one of the features of the EU itself, acquiring a highly relevant symbolic power. It is worth mentioning that this symbolic nature of borders dates back to the birth of modern states in Europe, which implied, as well, a "paradigm shift"<sup>3</sup> in the nature and functions of borders. Historians have extensively shown that the birth of modern state borders determined progressively a spatial turn from the "*frontière-zone*" – i.e. a border region

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<sup>1</sup> The Schengen States, i.e. those States that have abolished their internal border controls, are 22 EU Member States plus 4 non-EU Member States (Switzerland, Norway, Lichtenstein and Iceland). UK and Ireland have opted-out, whereas Denmark is bound to the elimination of internal border controls under international law. Finally, Romania, Bulgaria, Cyprus and Croatia are bound to the Schengen acquis but are still not formerly part of the Schengen area, i.e. have to carry out border controls with other EU States.

<sup>2</sup> Interestingly Y Pascouau defines Schengen as a "success story", Id., "The Schengen area in crisis – the temptation of reinstalling borders", (2016), European issues No. 392, 18 May 2016.

<sup>3</sup> So Kahn, D., *Die deutsche Staatsgrenzen*, Mohr, Tübingen, 2004, p. 12.

or area not clearly defined – to the “*frontière-ligne*”, a clear sign that distinguished one State from another.<sup>4</sup> It follows that border linearity represents a modern achievement, which was essentially connected with the need of modern States to define the exact point to which their sovereignty arrives, with borders therefore representing a “territorial projection” of sovereignty. The construction of an area without internal border controls among EU States has therefore entailed a powerful symbolic milestone of European integration. In the context of the Schengen experience, state borders have not disappeared, but are somewhat quiescent, as Schengen States achieved the elimination internal border checks.

Mass arrival of refugees and migrants is not a new phenomenon in the European Union. As a matter of fact, the Yugoslav Wars triggered a new stage in EU asylum law, whose need for reform was echoed in the Tampere Conclusions stating “*Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union*”<sup>5</sup>. Not by coincidence the Temporary Protection Directive was approved in 2001 to deal with the refugees flowing from Balkan countries. More recently, Italy experienced a large inflow of citizens mainly from Tunisia, after the outbreak of the so-called “Arab Springs”.<sup>6</sup>

However, the present deterioration of the situation in the Middle East, and particularly, the outbreak of the civil war in Syria, has led to an unprecedented number the refugees coming towards EU countries through their land and sea borders. It is worth remembering nonetheless that Europe hosts a very small percentage of the current refugee population. This applies as well to Syrian refugees who are mainly hosted in Turkey, Lebanon, Jordan and Egypt, whereas European countries are currently hosting less than a million Syrian refugees<sup>7</sup> and interaction between the resident population and refugees is much lower than in the above-mentioned countries. In any case, the extraordinary nature of the ongoing situation should not be understated: it has been

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<sup>4</sup> The literature on this aspect is extensive: see Guichonet, P., Raffestin, C., *Geographie des frontières*, PUF, Paris, 1974, p. 5 ff.

<sup>5</sup>Tampere European council 15 and 16 October 1999, Presidency Conclusions, [http://www.europarl.europa.eu/summits/tam\\_en.htm#c](http://www.europarl.europa.eu/summits/tam_en.htm#c).

<sup>6</sup> See on this Nascimbene, B., Di Pascale, A. “The ‘Arab Spring’ and the Extraordinary Influx of People who Arrived in North Italy from North Africa” (2011), *European Journal of Migration and Law*, 346.

<sup>7</sup> According to UNHCR data of Syrian refugees are the following: 2,744,915 in Turkey, 1,048,275 Lebanon, 651,114 Jordan: <http://data.unhcr.org/syrianrefugees/regional.php> (accessed: 31 May 2016).

calculated indeed that more than one million people arrived in Greece and Italy by sea in 2015.<sup>8</sup>

This is not only causing challenges to the external borders, but rather internal borders are being affected as well due to an extraordinary phenomenon of “secondary movements” represented by migrants moving from their first EU State of arrival (mainly Greece and Italy) towards other Member States, i.e. crossing internal borders of the Schengen area irregularly. As a consequence, as of September 2015, several Schengen States decided to reinstate temporarily their internal border controls according to the relevant provisions of the Schengen Borders Code. This seems to have legal, practical, theoretical, and political implications. First, it should be noted that whereas the practice of reintroducing border controls is not anything new, this being allowed under the Schengen Borders Code, in the context of the current crisis it has assumed an unprecedented scope and meaning, highlighting the problematic relationship between Dublin and Schengen rules.<sup>9</sup> Second, it is worth focusing on the conditions that led some Schengen States to reinstate border controls: interestingly<sup>10</sup>, both in the press and in the notification letters it appeared that some relied on the principle of solidarity enshrined in Art. 80 TFUE<sup>11</sup>, assuming that such a measure was required due to the lack of - or inadequate registration of - migrants by “frontline” Member States, whose implementation of EU law was inconsistent and, particularly, in conflict with the solidarity principle.<sup>12</sup> This paper takes a different view by showing

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<sup>8</sup> According to UNHCR data: 1,015,078 in 2015 and 194,845 as for May 2016: <http://data.unhcr.org/mediterranean/regional.php>.

<sup>9</sup> See on this Peers, S., “The Refugee Crisis: What should the EU do next?” EU Law Analysis, <http://eulawanalysis.blogspot.com.es/2015/09/the-refugee-crisis-what-should-eu-do.html>.

<sup>10</sup> This was already remarked by Guild, E., et al, “What is happening to the Schengen borders?“, (2015), CEPS, No. 86/2015, [www.ceps.eu](http://www.ceps.eu), p. 13.

<sup>11</sup> See on the interpretation of the solidarity principle in the EU Bast, J., “Solidarität im europäischen Einwanderungs- und Asylrecht”, in Knodt, M., Tews, A. (eds.), *Solidarität in der Europäischen Union*, Nomos, Baden-Baden, 2014. See also the proceedings of the Conference Searching for Solidarity in EU Asylum and Border Policies held in Bruxelles on 28-29 February 2016 at <http://odysseus-network.eu/conference-2016>.

<sup>12</sup> See for instance the notification letter from Germany of 14 September 2015, <http://data.consilium.europa.eu/doc/document/ST-11986-2015-INIT/en/pdf>, that affirms as follows: “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 procedure and the EURODAC regulations, continues to apply. This mean ... 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. And asylum seekers must also accept the fact that they cannot choose which EU Member State will grant them protection. *The single European legal*

that solidarity might appear to be a captious reasoning when one looks at the implementation of other anti-crisis measures. Third, this research cannot be completed by putting it into an appropriate context: a purely legal point of view seems, in other words, insufficient to understand States' attitudes as well as ongoing and future political actions: to this end the issue of the Schengen "suspension" needs to be framed within the momentum of right-wing populism currently affecting several EU countries, included those that reintroduced internal border controls.

In light of the above, this paper will try to examine the present state of health of the Schengen regime. To this end, this paper will attempt to show that Schengen finds itself squeezed between two constraints: on the one hand, it is experiencing the weaknesses of the Dublin system, mainly caused by the imposition of automatic criteria to determine the State responsible for processing asylum claims and that does not take into proper consideration geographical realms as well as refugee preferences; on the other hand, the free movement area is being pressured by the surge of right-wing populist political parties and Eurosceptic attitudes that constitute a further threat to the reinstatement of its ordinary course. Those two forces are therefore exerting a contextual compressive force on the Schengen system.<sup>13</sup>

Having said that the paper will try to respond to the following research questions. Is the coexistence of Dublin and Schengen systems becoming unbearable for some EU countries due to an extraordinary arrival of migrants seeking international protection within Europe? How will the reintroduction of internal border controls affect access to international protection in the EU? Does the general reintroduction of internal border controls in several Member States indicate a first step towards the end of the Schengen regime? Is the reintroduction of border controls an efficient measure? Does

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*framework can function in totality only if all Member States act in solidarity to face our common responsibility*" (emph. added). For a very similar account see also the notification letter from Austria, issued on 17 September 2015, stating that "The great willingness to help shown by the Republic of Austria over the past few weeks should not be overstretched. Under European law, the Republic of Austria is not responsible for the vast majority of the persons concerned", at <http://data.consilium.europa.eu/doc/document/ST-12110-2015-INIT/en/pdf>.

<sup>13</sup> Needless to say, in any case, that Schengen itself suffers from weaknesses, being the most apparent in the current crisis the too discretionary power left to member States to reinstate internal border checks. As a matter of fact, during the negotiations of the reform of the Schengen Borders Code the Commission proposed to "centralize" the power to reinstate border checks, which could have avoided at least some of the problems the Schengen area is now facing.

the growing populism in the EU have a role in the practice of reintroducing internal border controls?

To this end, before going into detail about the reintroduction of internal border checks, the next section 2 will try to frame the Schengen crisis within the other anti-crisis measures the EU is taking. Then, section 3 will illustrate the concrete functioning of Schengen and the hypothesis for its limitation and suspension. Section 4 will address the Dublin's constraint putting in relation how the latter is affecting Schengen rules, whereas section 5 will analyse the populist's constraint. Finally, section 6 will recall the issues (particularly economic) still pending, and will try to envisage future legal and political scenarios. Methodologically, an interdisciplinary approach has been used, based on both legal and political sources.

## **2. Current situation both at EU and national level: Schengen and Dublin in the wider contexts of reform of the EU Migration and Asylum Law**

Crisis is a complex and polysemous concept. In Greek the word means choice, decision and its origin evokes a state of tension between the need of experiencing a new epoch and the uncertainty of what decisions are required to overcome the hardship of the moment.<sup>14</sup> This seems relevant for the ongoing refugee crisis, which is currently stimulating a wide reflection on the structural deficiencies of the EU asylum and refugee law, showing its inadequate nature to respond to massive migrant inflows. As a matter of fact, a general reform of many aspects of the EU regulation in this field is at stake, covering both the EU internal and external action in the field of migration and asylum.<sup>15</sup> For this reason, in order to evaluate the present situation of Schengen and the aforementioned constraints which that legal system is facing, it is worth framing the issue of the reinstatement of the internal border checks within the several anti-crisis measures or proposals that have been currently undertaken or advanced at national and

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<sup>14</sup> See the definition of "Crisi" in *Treccani, Vocabolario Online*, [www.treccani.it](http://www.treccani.it) (in Italian).

<sup>15</sup> See generally on the main feature of the EU migration and asylum law Peers S., "Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon", in *European Journal of Migration and Law*, 10, 2008; Thym, D., "EU migration policy and its constitutional rationale: a cosmopolitan outlook", in *Common Market Law Review*, 2013; Neframi, E., "La repartition de competences entre l'Union europeenne et ses Etats membres en matiere d'immigration irreguliere", in Dubin (ed.), *La legalite de la lutte contre l'immigration irreguliere par l'Union europeenne*, Bruxelles, Bruylant, 2012.

EU level. Some of them are already in place – though they still require a more proper implementation – whereas others are still at a preparatory stage.

Regarding the first, after a lasting discussion, the hotspot approach and relocation scheme have finally been put into effect<sup>16</sup>, though the implementation of hotspot in Italy and Greece is surrounded by several open questions<sup>17</sup>, and the number of asylum seekers relocated represents a very small percentage compared to the quota established under the (second) 2015 Council Decision.<sup>18</sup> Another relevant anti-crisis measure relates to the very recent conclusion of the EU-Turkey deal, which was adopted to address irregular arrivals on the coast of Greece.<sup>19</sup>

In regards to the second, perhaps one of the more relevant proposals in this regard concerns the new reform package recently presented by the EU Commission to reform the Common European Asylum System. Selecting the most relevant changes for the present topic<sup>20</sup>, the proposals include: the creation of an EU Asylum Agency, so as to strengthen the mutual exchanges between national asylum agencies, whose lack of cooperation contributes to creating disparities in recognition rates and procedures; the introduction of a system of sanctions for asylum seekers founded to stay irregularly in a non-responsible State according to the Dublin rules.

The problems connected with the Schengen and Dublin systems as well as with current reform proposals need to be framed within this wider context. In particular, the

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<sup>16</sup> See Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece and Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece.

<sup>17</sup> For a great account see Maiani, F., “Hotspot and Relocation Schemes: the right therapy for the Common European Asylum System?”, in EU Immigration and Asylum Law and Policy, [eumigrationlawblog.eu](http://eumigrationlawblog.eu), 3 February 2016 and Webber, F., “Hotspots for asylum applications: some things we urgently need to know”, EU Law Analysis, 29 September 2015. From the side of the NGO see the letter from European Council of Refugees and Exiles to – inter alia – the Commissioner for Migration, Home Affairs and Citizenship, on the hotspot approach, [http://www.accem.es/ficheros/documentos/pdf\\_noticias/2016\\_pdf/ELENA%20letter%20relocation-hotspots%20EC.pdf](http://www.accem.es/ficheros/documentos/pdf_noticias/2016_pdf/ELENA%20letter%20relocation-hotspots%20EC.pdf).

<sup>18</sup> Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, Council of the EU, 12098/15, 22 September 2015.

<sup>19</sup> Peers, S., Roman, E., “The EU, Turkey and the Refugee Crisis: What could possibly go wrong?” In EU Law Analysis, 5 February 2016, <http://eulawanalysis.blogspot.com.es/2016/02/the-eu-turkey-and-refugee-crisis-what.html>.

<sup>20</sup> This and other proposals are discussed by Peers, S., “The Organisation of EU asylum law: the latest EU asylum proposals”, <http://eulawanalysis.blogspot.com.es/2016/05/the-orbanisation-of-eu-asylum-law.html>.

practice of reinstating border controls has a common feature with the above-mentioned anti-crisis measures, i.e. to contrast and reduce the risk of unregistered and uncontrolled secondary movements and more generally to ensure coherence between policies at external and internal borders by adopting a “containment” rationale. There are of course on the floor several human rights oriented proposals, as those that could facilitate the access to international protection, such as resettlement. However between containment and human rights rationales, the fastest and the feasible in the short term is the first.<sup>21</sup>

### 3. An overview of the Schengen system and its potential limitations

The Schengen system dates back to an agreement first signed between France and Germany at Saarbrücken in 1984 and then extended to the Benelux countries by means of the Treaty signed at Schengen on 14 June 1984. In 1990 a Convention of application of the Schengen system was adopted and several States adhered to it.<sup>22</sup> Finally, the Treaty of Amsterdam “communitarized” Schengen, i.e. transformed its rules from an international law level to the EU law one.<sup>23</sup> Finally, in 2006 the Schengen Borders Code was adopted in order to systemize the wide range of rules enacted and to

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<sup>21</sup> On the potential reforms of both system see: Peers, S. “The Refugee Crisis: What should the EU do next?”, EU Law Analysis, <http://eulawanalysis.blogspot.com.es/2015/09/the-refugee-crisis-what-should-eu-do.html>. On the alternatives to Dublin system see Guild, E., Costello C., Garlick, M., Moreno-Lax, V., “Enhancing the Common European Asylum System and Alternatives to Dublin” [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL\\_STU\(2015\)519234\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU(2015)519234_EN.pdf). See also for a critical account on the Dublin system: Di Filippo, M., “Le misure sulla ricollocazione dei richiedenti asilo adottate dall’Unione europea nel 2015: considerazioni critiche e prospettive”, in *Diritto, immigrazione e cittadinanza*, 2/2015 (in Italian). On 4 May 2016, the EU Commission has proposed a reform of the Dublin system that, if adopted, would introduce a Dublin IV Regulation: *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)*. A first assessment is available here: *Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission*, in EU Immigration and Asylum Law and Policy, 17 May 2016, <http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/>.

<sup>22</sup> See seminally, O’Keefe, D., “The Schengen Convention. A suitable model for European Integration?” in *Yearbook of European Law*, 1992 and Meijers, J., *Schengen, internationalization of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and the police*, Kluwer, The Hague, 1991.

<sup>23</sup> Kujiper, S., “Some legal problems associated with the communitarization of policy on visas, asylum and immigration under the Amsterdam Treaty and incorporation of the Schengen acquis”, in *Common Market Law Review*, 37/2000.



clarify the rules on the crossing of the external and internal borders. This regulation was amended in 2013<sup>24</sup> as a consequence of the Arab Springs<sup>25</sup>.

From a purely legal point of view when the expression “Schengen system” is used, we tend to simplify a much more complex legal system, which comprises a wide array of rules directed at ensuring an area where the freedom of movement of persons among States is guaranteed.<sup>26</sup> At least three situations may lead to limiting freedom of movement within this area. First and foremost is when Member States reintroduce internal border controls in the events established in the Code (see *infra*). Second, some Member States may adopt police controls in border zones, as this is allowed by the Code “insofar as the exercise of those powers does not have an effect equivalent to border checks” (Art. 21). This is probably a more “sneaky” way that States can control their borders, as such controls rely entirely on national law (e.g. any notice to the EU institution or Member States is required and such activities may be carried out at any time). Finally, in the context of the current crisis, Schengen and the principle of free movement is experiencing another relevant limitation, as some Member States are constructing barriers and fences to “channel” migrant’s arrival, i.e. to identify and separate those aiming at requesting international protection from economic migrants.

In this paper, attention will be circumscribed to the first limitation by looking at the provisions enshrined in Chapter II of the Schengen Borders Code entitled “Temporary reintroduction of border controls”.<sup>27</sup> Initially, the Code stated two procedures to reintroduce border controls, but the above-mentioned 2013 amendment added a third one. The first two procedures are activated directly by Member States to deal with serious threats to “public policy or internal security”, by communicating to

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<sup>24</sup> See Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, 6 November 2013; Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, 6 November 2013.

<sup>25</sup> Carrera, S., Den Hertog, L. and Parkin, J., “EU Migration Policy in the wake of the Arab Spring. What prospects for EU-Southern Mediterranean Relations?”, Medpro, 2012.

<sup>26</sup> Cornelisse, G., “What’s Wrong with Schengen? Border Disputes and the Nature of Integration in the Area Without Internal Borders”, in Common Market Law Review, 2014.

<sup>27</sup> Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

the EU Commission and Member States their intention to reinstate internal border controls. The procedure differs in timing and duration, as the first is provided for foreseeable events (Art. 24) whereas the second for unforeseeable events that require immediate action (Art. 25).

Finally, the Code provides now for a “specific procedure where exceptional circumstances put the overall functioning of the area without internal border control at risk” (Article 26). This procedure differs from the others by at least two features. On the one side, the specific procedure of Article 26 implies the cooperation between EU and national institutions: the EU Commission makes a proposal to the EU Council, which in turn issues a recommendation to some Member State to reinstate internal border controls. EU institutions are therefore competent to enact the procedure whereas Member States have to implement the Council recommendation. The cooperative nature of this procedure implies that Member States cannot activate by themselves this procedure but have to wait for a recommendation from the Council to that purpose. On the other side, the grounds to reinstate border controls following Art. 24 and 25 differ from those established in Article 26. Whereas, in the first case the Code provides for a “national” requirement, referring to a serious threat to public policy and the internal security faced by the Member State aiming to reinstate border control, in the second case the requirement becomes somehow “European”, to the extent that it follows from “circumstances related to the overall functioning of the area without internal border control”.<sup>28</sup>

After having illustrated how the system formally works, the way in which these provisions are applied must be verified more concretely. To shed light on the relationship between the theory and the practice seems particularly relevant in a field of study such as migration law, where the gap between the law as written and the law in action may be particularly wide. This is particularly relevant as far as the crisis is concerned for all the procedures outlined above. First, “national” reinstatement of border controls regulated in Art. 24 and 25 have acquired throughout 2015 new

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<sup>28</sup> This difference is built upon the reflection of Pascouau according to whom the new procedure provide for a “European public policy” hypothesis to reinstate border control: see Pascouau, Y., “Schengen and solidarity: the fragile balance between mutual trust and mistrust”, EPC Policy Paper, [http://www.epc.eu/documents/uploads/pub\\_2784\\_schengen\\_and\\_solidarity.pdf](http://www.epc.eu/documents/uploads/pub_2784_schengen_and_solidarity.pdf) (last access: 31 May 2016). On the notion of an European Public Order it might be useful to refer to Lavenex S., Wagner, W., “Which European Public Order?”, in *European Security*, 2007.

features. Further, the EU Council has recently activated the “European” procedure, allowing Member States to keep their internal border controls for up to six months. Both hypotheses will be examined separately.

Regarding procedures provided in Art. 24 and 25 we should stress that the overall usage of the reintroduction powers has so far complied with EU law and has not been very problematic. As a matter of fact, Member States have made use of Art. 24 and 25 on several occasions.<sup>29</sup> As regards the general experience of reintroducing border controls some features may be listed. Firstly, the use of standardised notification letters to the EU Commission is of some interest.<sup>30</sup> In many cases Member States reinstating internal border controls have given notice to the EU and national institutions in a very succinct and bureaucratic way, and the reasons why they urged the need for temporary exemption from the free movement principle was not always clear.<sup>31</sup> In particular, the lack of motivation appears bluntly in cases of international ceremonies or official meetings, such as G8 or EU Council reunions, where the reintroduction of internal border control is basically an automatic practice. For this reason, it is important to reiterate that the 2013 Schengen Borders Code amendment has enhanced the role of the principle of proportionality in reintroducing internal border controls. Significantly, the Code clarifies now that the reinstatement of border controls needs to be a measure of last resort.<sup>32</sup> In principle, this should lead Member States to deepen the content of their notifications and impose a stricter control of the EU Commission on Member States. However, without recourse to imposing sanctions in cases of unjustified reintroduction of border controls, these new rules will likely have little impact on the habits of Member States.

A second feature that emerges from the experience of Schengen suspension refers to the grounds that over the course of the years have lead States’ reinstatement of border controls. Indeed, migration issues have been used as justification for the reintroduction of border controls on just a few occasions, with ceremonies or EU

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<sup>29</sup> A complete and recent study of the practice of reintroducing internal border controls has been recently conducted in Van der Woude M. and Van Berlo, P., “Crimmigration at the Internal Borders of Europe? Examining the Schengen Governance Package”, in *Utrecht Law Review*, 2015, pp. 61 ff.

<sup>30</sup> This is also remarked by Carrera, S., Guild, E., Merlino, M., Parkin, J., “A Race against Solidarity. The Schengen Regime and the Franco-Italian Affair”, CEPS, 2011, [www.ceps.eu](http://www.ceps.eu).

<sup>31</sup> See, as an example of this concise style the notification letter from the Government of Spain: Document Register, 6825/06, <http://data.consilium.europa.eu/doc/document/ST-6825-2006-INIT/en/pdf>.

<sup>32</sup> Art. 23 (II), Art. 23 (a) (II), Art. 26 (II), Art. 26 (a) (I).

meetings being more frequently used as pretext<sup>33</sup>. This is an indication that apart from the remembered clash between France and Italy in 2011 migration flows have so far never affected the overall functioning of the Schengen system.

Since the outbreak of the refugee crisis some new features connected with the Schengen suspension can be detected. First and foremost, Schengen States have almost contemporaneously reintroduced border controls, somewhat triggering a domino effect. Since September 2015, internal border controls were reintroduced and then extended in Germany, Austria, Sweden, Slovenian, Denmark, Norway, Hungary, Malta and France.<sup>34</sup>

Furthermore, in the context of the 2015/2016 general reinstatement of internal border controls Member States are explicitly justifying their measures by stating that the serious threat to their public policy and internal security follows from an unexpected consequence of a sheer flow of migrants and refugees not registered in their first EU State of arrival. Concerning the content of notification letters, at least one positive innovation can be mentioned: Member States are now more attentive to detail why they are reinstating internal border controls; some of the notifications even comprise a collection of relevant data. This change can probably be connected to the fact that in the context of the 2013 reform it has been explicitly affirmed in recital no. 5 of the Code that migration should not be *per se* a requirement to reinstate internal border control.<sup>35</sup> Therefore, it can be argued that this more cautious attitude has probably to do with the fact that Member States might be worried by a more penetrating control carried out by the EU Commission. However, this, in the exercise of powers granted under the Schengen Borders Code, has evaluated the suspension of Schengen in several occasions, confirming the correctness of the Schengen

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<sup>33</sup> See Groenendijk, K., “New borders behind old ones: Post-Schengen controls behind the internal borders and inside the Netherlands and Germany”, in Id., Guild, E., and Minderhoud, P. (ed.), *In Search of Europe’s Borders*, The Hague 2003 and Id. Groenendijk, K. (2004), “Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?”, *European Law Journal* (10), pp. 150-170.

<sup>34</sup> All the data containing the reintroduction and prolongation of internal border checks in the mentioned States are available at the website of the European Council, <http://www.consilium.europa.eu/register/en/content/int/?lang=EN&typ=ADV>.

<sup>35</sup> See Regulation 1051/2013, recital No. 5: “Migration and the crossing of external borders by a large number of third-country nationals should not, per se, be considered to be a threat to public policy or internal security”.

“suspension”.<sup>36</sup> It has firstly delivered its opinion in October 2015<sup>37</sup> affirming that internal border controls reintroduced in Austria and Germany complied with the Schengen Border Code. On that occasion, the Commission itself also reserved the possibility to re-evaluate the reintroduction of border control.<sup>38</sup> Then, in its report on the functioning of the Schengen system the Commission reiterated that the reintroduction of border controls was motivated by the lack of, or inadequate registration of migrants upon their first arrival into the EU.<sup>39</sup> Lastly, by proposing the EU Council to issue a recommendation to certain Member States in order to guarantee them the prolongation of the internal border controls,<sup>40</sup> the Commission has not just confirmed that the exceptions to the ordinary Schengen regime are in line with the Schengen Borders Code, but has affirmed its necessity as a measure to maintain the Schengen system: *“The application of Article 26 Schengen Borders Code is a safeguard for the overall functioning of the Schengen area. It is not a sanction against any Member States, nor does it aim at excluding any Member State from the Schengen area”*.<sup>41</sup>

In order to evaluate the practice concerning the reintroduction of border controls and its evaluation by the Commission, it seems relevant to go back to the interpretation of recital n. 5 of the Regulation 1051/2013 previously mentioned. The Commission has indeed explicitly recalled it by affirming the following: *“Although in 2013 the legislators agreed that migratory flows cannot per se justify the reintroduction of checks at internal borders, the Commission takes the view that the uncontrolled influx of high numbers of undocumented or inadequately documented persons, not registered upon their first entry to the EU, may constitute a serious threat to public*

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<sup>36</sup> Although in 2013 the legislators agreed that migratory flows cannot per se justify the reintroduction of checks at internal borders, the Commission takes the view that the uncontrolled influx of high numbers of undocumented or inadequately documented persons, not registered upon their first entry to the EU, may constitute a serious threat to public policy and internal security and thus may justify the application of this extraordinary measure available under the SBC.

<sup>37</sup> Commission Opinion of 23.10.2015, on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria pursuant to Article 24(4) of Regulation No 562/2006 (Schengen Borders Code).

<sup>38</sup> See at par. 46: “The Commission underlines that the present opinion does not prejudice the question whether any further prolongations would be necessary and proportional”.

<sup>39</sup> Communication from the Commission to the European Parliament and the Council. Eight biannual report on the functioning of the Schengen area, 1 May – 10 December 2015, COM(2015)675 final.

<sup>40</sup> Communication from the Commission to the European Parliament, the European Council and the Council. Back to Schengen – A Roadmap, COM(2016) 120 final.

<sup>41</sup> Ibidem, p. 11.

*policy and internal security and thus may justify the application of this extraordinary measure available under the SBC”.*

However, if Member States are allowed to reintroduce internal border controls as a consequence of inadequate registration at external borders, it follows that should migrants be duly fingerprinted, reintroducing or extending internal border controls may become (at least) problematic, if not unlawful. It is then relevant in this regard to quote a recent evaluation of the “Hotspot approach” carried out by the Commission. In its *Progress Reports* on the Implementation of the hotspots in Greece and Italy, the Commission has documented a significant increase in fingerprinting rates in both countries.<sup>42</sup> Regarding Italy, the Commission states that, as of February 2016, almost 100% of migrants are fingerprinted.<sup>43</sup> The same occurred in Greece.<sup>44</sup> Then, if the whole number of migrants arriving in Greece and Italy are effectively fingerprinted, as those data document, one could maintain that the main argument used in justifying internal border control reinstatement becomes inconsistent. Schengen States could perhaps counteract by saying that fingerprinting does not impede secondary movements, but then they could provide sufficient arguments about rates of secondary movements. However, even in those circumstances, reintroducing border control could probably be questioned: if migrants are fingerprinted, then in case of secondary movement they can be transferred to the competent EU countries under the Dublin rules. Therefore, as EU law would offer a remedy to bring order to the phenomenon of secondary movement, it becomes arguable to consider that a threat to the public policy or internal security of Member States still persists.

After having outlined the transformation in the practice of reintroducing border controls according to Article 24 and 25 of the Schengen Border Code, we must consider the other new feature of the 2015/2016 Schengen crisis: for the first time since its introduction, at the time of writing (May 2016), the procedure of Article 26 has been

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<sup>42</sup> See the study carried out for the LIBE Committee Neville, D., Sy, S., Rigon, A., “On the frontline: the hotspot approach to managing migration”, <http://www.europarl.europa.eu/supporting-analyses>

<sup>43</sup> European Commission, Italy - State of Play Report, COM(2016) 85 ANNEX 3, 10 February 2016, p. 2: “Fingerprinting rates reported by the Italian authorities, the IOM and Frontex have almost reached 100% in recent disembarkations in operational hotspots (87% overall by January)”.

<sup>44</sup> Reports from the Commission to the European Parliament and the Council. Progress report on the Implementation of the hotspot approach in Greece, COM(2016) 141 final: “Both the Commission and Frontex have observed that significant progress has been made since September 2015 and at this time all migrants over 14 referred to the hot spots are registered in line with the Schengen Borders Code”.

activated: The EU Council, following the EU Commission proposal, has issued its recommendation that would allow a number of Member States to maintain border controls up to six months, i.e. up to December 2016. The whole procedure refers to the deficiencies of Greece in managing its external borders and follows an opinion of Greece's Action Plan<sup>45</sup> adopted to comply with the EU Council recommendation.<sup>46</sup>

#### **4. A complex coexistence: the relationship between asylum seekers' rights and Schengen "suspension"**

Over the course of the functioning of the Schengen regime, the reintroduction of internal border controls raised concerns with regard to its potential constraints of free movement and the principle of non-discrimination. As has already been briefly outlined in the introduction and in the previous sections, the refugee crisis is showing that the reinstatement of border controls may potentially hinder another fundamental right, i.e. the rights to seek international protection, which is enshrined both in EU primary and secondary law.<sup>47</sup> To put it another way the combined effect of mass arrivals of migrants and refugees and the wide reinstatement of internal border controls has put into doubt the coexistence of the Schengen and the Dublin systems<sup>48</sup>: as a knock-on effect,

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<sup>45</sup> Communication from the Commission to the Council - Assessment of Greece's Action Plan to remedy the serious deficiencies identified in the 2015 evaluation on the application of the Schengen acquis in the field of management of the external border, COM(2016)220 final, 12 April 2016.

<sup>46</sup> Communication from the Commission to the European Parliament, the European Council and the Council, Back to Schengen – A Roadmap, 4 March 2016.

<sup>47</sup> See Art. 78 TFUE; Art. 19 CDFUE. The Common European Asylum System is then composed by rules on reception of asylum-seekers (*Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*); on how to process international protection claims (*Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*); and on standard for beneficiaries of international protection (*Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*).

<sup>48</sup> It might be worth recalling the principal features of the system: first, asylum seekers are required to have their international protection applications processed by the first EU Member State of arrival, unless familiar exemptions applies; second, the first State of arrival is required to fingerprint all migrants and register their data in the Eurodac database, otherwise the whole rationale collapse; third, States that are not responsible to process an international protection application are entitled to transfer asylum-seekers to the responsible State; fourth, States that would not be responsible under Dublin rules may take charge of processing asylum applications under the sovereignty clause. The sources of the system are the following: *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 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-*

the (ill-) functioning of the Dublin rules have had repercussions on the ordinary course of Schengen rules, highlighting its weaknesses. What has become apparent from the crisis is that neither the Schengen system nor the Dublin system is properly equipped to face a sudden turmoil, the Schengen system allowing too much discretionary power to the Member States, and the unfairness of the second being exacerbated by the current crisis. As it is known, the whole rationale of the Dublin system relies on the rationale to avoid secondary movements. However, it has become clear that the automatic logic of the system – according to which the first State of arrival is the responsible country to process asylum demands – does not guarantee that rationale and in fact it produces a counterproductive effect. It is not easy to systemize the factors that impulse secondary movements but some of them certainly involve some of the most relevant weaknesses of the Common European Asylum System: incentives that might lead asylum seekers to move from one State to another include the existence of family, social, or work ties that are not considered by Dublin rules to determine the responsible State (if not in a very limited way for unaccompanied minors); the different recognition rates of asylum claims among EU countries mainly caused by the national competence on the recognition of asylum claims (so-called asylum lottery); different reception standards and measures that entitle asylum seekers highly different rights depending on the country they stay in pending their asylum application, which is due to the lack of harmonization in refugees reception conditions; last, the provision that entitles beneficiaries to international protection with permanent resident permit allowing them to freely circulate within the Schengen area only after five years. Furthermore, we should recall that the Dublin Regulation entrusts individual States with the possibility to correct secondary movements by transferring asylum seekers to the responsible

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*country national or a stateless person. Exceptions to the general rule is established under Art. 8 and 9; Regulation (EU) No. 603/2013 or 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 (recast). On the unfair nature of the system see Caggiano, G., "L'insostenibile onere della gestione delle frontiere esterne e della competenza di "paese di primo ingresso" per gli Stati frontalieri nel Mediterraneo", in *Scritti sul diritto europeo dell'immigrazione*, Giappichelli, Torino, 2011 (in Italian).*



State: however, transfer rates are very low, and non-responsible States will usually process asylum claims that, according to Dublin rule, should have been submitted to other States.

Therefore both asylum seekers and the States themselves make clear the distance between the rules on paper and their real outcome.

As things stand, some proposals to reform the system have been advocated and could benefit the functioning of both Schengen and Dublin rules. In particular, the need to strengthen asylum-seekers' preferences is gaining salience among scholars<sup>49</sup> and NGOs<sup>50</sup>. Accommodating refugees selected destinations – to a reasonable extent – could reconcile efficiency, responsibility and solidarity (amongst EU countries and towards refugees). In this perspective, it is worth mentioning a research that has reasonably outlined the relevance of alleviating the coercive elements of the Dublin system.<sup>51</sup> More recently another study has advocated for a structural reform of the current system. According to that proposal, a new hypothetical allocation system could be envisaged assigning a flexible quota to each country. Then, in order to determine the responsible State, instead of the automatic criteria represented by the first State of arrival, the system would first consider refugees' choice – by means of a list of “connecting factors” (family, work, cultural, social ties, presence of a sponsor in the selected country). In the event of a lack of any of those links, the responsible country would be the one that has the “lowest degree of compliance with its quota”.<sup>52</sup>

What seems to be crucial is that any new proposal should be based on a system that works *actively* to accommodate several (and opposed) interests, as opposed to the current one which *passively* assigns responsible countries. Allocation criteria to relocate refugees among EU countries, then, should be rewritten in order to take into

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<sup>49</sup> See amongst others Mouzourakis, M., “We Need to Talk about Dublin’ Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union”, RSC, Working Paper Series No. 105, December 2014, <http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp105-we-need-to-talk-about-dublin.pdf>.

<sup>50</sup> “Memorandum Allocation of refugees in the European Union: for an equitable, solidarity-based system of sharing responsibility”, [https://www.proasyl.de/wp-content/uploads/2013/03/Memorandum\\_Dublin\\_engl.pdf](https://www.proasyl.de/wp-content/uploads/2013/03/Memorandum_Dublin_engl.pdf).

<sup>51</sup> Guild, E., et al, New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International, Study for the LIBE Committee, (European Parliament, 2014) [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL\\_STU\(2014\)509989\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509989/IPOL_STU(2014)509989_EN.pdf).

<sup>52</sup> Di Filippo, M., “From Dublin to Athens: A Plea for a Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures”, Policy Brief, January 2016.

account individual and collective determinants, instead of geographical and casual ones. Such a re-orienting of the rationale could put order within the free movement area, accommodating individual preferences and contrasting secondary movement phenomena. Nevertheless, the recent reforms package of EU asylum law from the EU Commission seems to go in a different direction: it will suffice to recall here that far from reviewing the rules on responsible States (as advocated by the above mentioned studies), in order to avoid secondary movements the Commission is proposing to introduce a set of sanctions for asylum seekers who are found to stay in a State not responsible under Dublin rules.<sup>53</sup>

Whereas so far Dublin rules have been criticised for their lack of guarantees for refugees, it remains now to be seen if Schengen rules too – as they are implemented in the context of a wide recourse to internal controls reinstatement – are imposing a disproportional burden on the situation of refugees in Europe. It is worth mentioning that complaints about the reinstatement of border checks come not only from NGOs but Frontex itself has outlined the inefficiency and the counter-productive effect of such practice: *“The main effect of the reintroduction of controls at internal borders has been the restraining of the chaos at the borders. However, between September and December 2015, internal controls have not reduced the general migratory flow, neither at the external nor internal borders”*.<sup>54</sup> From a strict legal point of view, the position of the Commission according to which Austria and Germany (no opinion has been provided for the other cases) complied with the Schengen Borders Code in reintroducing internal borders check can hardly be criticized. However, three further elements may be in the future considered to question if such a general recourse to reinstate border checks does actually fit within the requisite to reinstate border checks in accordance with the principle of proportionality (“as a last resort”, as provided for by the SBC). On the one hand, it has to be considered that irregular border crossings often do not occur at border checkpoints, so reintroducing controls might be ineffective to that purpose. On the other hand, reintroducing border checks will also be ineffective against people claiming international protection. This is confirmed by the Schengen

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<sup>53</sup> This and other proposals are discussed by Peers, S., “The Organisation of EU asylum law: the latest EU asylum proposals”, <http://eulawanalysis.blogspot.com.es/2016/05/the-organisation-of-eu-asylum-law.html>.

<sup>54</sup> Frontex, Annual Risk Analysis, 2015.

Borders Code clarifying that the regulation is without prejudice of – inter alia – refugee’s rights, people that apply to international protection, and the principle of *non-refoulement*. It means that even if the State reintroduce border checks, this cannot deprive asylum seekers from their right to claim international protection, as this applies also “at the border”: it follows, that a person moving from one Schengen State to another should have his position examined before being relocated to the responsible State under Dublin rules. Moreover – from a political standpoint – it might be argued that the more Schengen States – internal to the Schengen area – reintroduce border checks, the more difficult it will be for “frontline” Schengen States to manage the migration crisis; this could indeed generate a “cap effect” with severe potential repercussions for reception conditions of refugees and migrants.

Lastly, whereas the lack of solidarity has been a frequent argument to justify borderclosure, if one looks at how those States are providing support to Mediterranean countries then the captious nature of the solidarity argument can easily be detected. As a matter of fact, many countries reinstating borders checks argued that southern countries adopted a “non-solidary” approach as they neglected lacked to fingerprint and control migrants inflows, allowing them to travel to other countries. However, Schengen States reinstating border checks calling for solidarity from southern States have so far only barely contributed to strengthen reception capacity in southern States, thus showing themselves a limited solidarity approach: this results if one looks at the financial, human-resources and organisational support to setting up hotspots in Greece and in Italy, as well as looking at the number of refugees relocated in those countries under the relocation scheme.<sup>55</sup>

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<sup>55</sup> Communication from the Commission to the European Parliament, the European Council and the Council, managing the Refugee Crisis: State of play of the implementation of the priority actions under the European Agenda on Migration: the Commission states: “The need for personnel and equipment was explicitly recognised at the informal meeting of EU Heads of State or Government in September – with a deadline of November to meet these needs. However, so far, the commitments made by Member States fall far short of the real needs. As of 8 October, only six Member States have responded to the call for contributions for EASO with 81 experts, out of the 374 needed. So far six Member States have responded to the call from Frontex with 48 border officials. Member States should rapidly submit their contributions to meet the Agencies' needs assessment”;

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2015%3A510%3AFIN>.

As for the state of play of relocation on 26 May 2016, see Member States' Support to Emergency Relocation Mechanism, [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_relocation\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf).

## **5. Schengen “suspension”, political parties and public opinion attitudes in the EU. The impact of the growing populism**

As has been outlined in the previous sections, the reintroduction of internal border controls will introduce further difficulties in the management of the refugee crisis and, what is more, represents an inefficient response thereto. However, the growing national trend to reintroduce border checks cannot be conceptualised under a legal point of view, but has to be framed within a wider political context characterised by an ongoing restrictive turn affecting political parties and public opinion attitudes. In order to investigate the above, the growth of populism or nationalism in Europe, their connection with asylum or migration reforms as well as polls about refugee crisis will be considered in turn.

That Europe is currently experiencing the resurgence or a massive increase of populist and nationalist parties is conventional wisdom, and several studies already provide significant evidence about increasing anti-immigrants policy platforms<sup>56</sup>. However, this is not to say that the refugee crisis is now fueling populism throughout Europe – which should be the subject of a specific analysis, as for instance has already done for the financial crisis<sup>57</sup> – but more modestly, trying to shed light on the relationship between such a political trend and internal border checks, which has to be carefully calibrated, such a link being different in one country from another.<sup>58</sup>

To get insight on the weight of right-wing populist parties, it might be worth noting that all Schengen States reinstating border checks are experiencing the existence of relevant populist parties, though to different degrees. Denmark, for instance, is one of those countries where the nexus between migration, border control and the rise of right-wing movements seems to have impacted the most on refugees. On the one hand, Danish case is particularly relevant in this context for the salience of the Danish People Party, whose political platform explicitly made reference to the reintroduction of border

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<sup>56</sup> See Aisch, G., Pearce, A., Rousseau, B., “How Far Is Europe Swinging to the Right”, New York Times, 22 May 2016, [http://www.nytimes.com/interactive/2016/05/22/world/europe/europe-right-wing-austria-hungary.html?\\_r=0](http://www.nytimes.com/interactive/2016/05/22/world/europe/europe-right-wing-austria-hungary.html?_r=0); Guide to nationalist parties challengin Europe, BBC News, 22 May 2016, <http://www.newsjs.com/url.php?p=http://www.bbc.co.uk/news/world-europe-36130006>; Wolff, G., “Den Populisten die Stirn bieten”, Die Zeit, 19 December 2015, <http://www.zeit.de/wirtschaft/2015-12/parteien-populismus-usa-frankreich-wahlen-gefahr>.

<sup>57</sup> See Kriesi, K., Takis, S., European populism in the shadow of the great recession, ECPR Press, 2015.

<sup>58</sup> See generally: Guide to nationalist parties challenging Europe, <http://www.newsjs.com/url.php?p=http://www.bbc.co.uk/news/world-europe-36130006>.

control.<sup>59</sup> Though it failed to enter the coalition government, the DPP was the second most voted parties in 2015. On the other hand, the reintroduction of internal border checks has to be seen in connection with other legislative interventions restricting asylum-seekers rights. By toughening a law that was already quite severe regarding refugee's rights, the recent reform to the Aliens Act introduced several restrictive provisions.<sup>60</sup> Among other things, the reform package makes family reunification for people holding temporary subsidiary protection status possible only after three years of residence (instead of one). Further, another highly debated amendment is the one that entrust police officers with the authority to search asylum seekers arriving in Denmark and confiscate their assets so as to cover for their subsistence in the country.<sup>61</sup> According to UNHCR's observations, the main purpose of such amendments was to reduce the attractiveness of the country for asylum seekers.<sup>62</sup> Therefore, the protracted reintroduction of internal border controls fit within this new conception of legislation, directed at toughening the condition of non-citizens from entering the country to the rights ensured to those that reside within Denmark. It will remain to be seen if the first data regarding a reduction of border crossing in Denmark will be confirmed.<sup>63</sup>

Those political and legislative transformations need naturally to be connected with the shifting attitude of public opinion with regards to the refugee crisis and migrants. Measuring electoral posture might be particularly difficult in this area and results from different studies unsurprisingly return often antithetical data.<sup>64</sup> In

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<sup>59</sup> Danish People's party leader demands border crackdown after election success, The Guardian, 19 June, 2015, <http://www.theguardian.com/world/2015/jun/19/danish-peoples-party-dahl-border-controls-election>.

<sup>60</sup> See the Amending Bill at [http://www.ft.dk/RIPdf/samling/20151/lovforslag/L87/20151\\_L87\\_som\\_vedtaget.pdf](http://www.ft.dk/RIPdf/samling/20151/lovforslag/L87/20151_L87_som_vedtaget.pdf) (in Danish).

<sup>61</sup> See for documented text: "Denmark Law to Stem Asylum-Based Immigration", 1 February 2016, <http://www.loc.gov/law/foreign-news/article/denmark-law-to-stem-asylum-based-immigration/>. For a discussion of in-compliance of the reform – as regards confiscation of assets – with ECHR: Hartmann, J., Feith Tan, N., "The Danish Law on Seizing Asylum Seekers", Assets, 27 January 2016, <http://www.ejiltalk.org/the-danish-law-on-seizing-asylum-seekers-assets/>.

<sup>62</sup> UNHCR Observations on the proposed amendments to the Danish Aliens legislation, L 87: Lov om ændring af udlændingeloven, [http://www.unhcr-northernneurope.org/fileadmin/user\\_upload/Documents/PDF/Denmark/UNHCR\\_Comments\\_on\\_Danish\\_Law\\_proposal\\_L87\\_January\\_2016.pdf](http://www.unhcr-northernneurope.org/fileadmin/user_upload/Documents/PDF/Denmark/UNHCR_Comments_on_Danish_Law_proposal_L87_January_2016.pdf), par. 5.

<sup>63</sup> See "11 personer søgte asyl onsdag", <http://www.dr.dk/nyheder/politik/11-personer-soegte-asyl-onsdag>, 14 January 2016, showing that during the first three days of border checks the number of asylum-seekers crossing the border has decreased from 108 to 70 persons.

<sup>64</sup> As for a positive trend towards migrants see for example Amnesty International, "Refugees Welcome Index shows government refugee policies out of touch with public opinion",

particular, the sensitiveness of public opinion whose attitude can be highly affected and transformed by events of great magnitude such as terrorist attacks, must be taken into account. The annual Standard Eurobarometer Survey has recently noticed its result, providing for some useful data about the state of public opinion in Europe on migration and refugee crisis.<sup>65</sup> First and foremost, it makes clear that migration is – unsurprisingly – at the top of EU citizens concerns, representing the second main challenge EU is facing (being the first unemployment) and showing the highest percentage increase among the set of issues discussed with interviewees if compared to 2013 results (33%).

A second relevant indication regards the answer to the question of whether the country of belonging should help refugees. The majority of EU citizens (65%) agree on providing help to refugees, however some interesting imbalances among public opinion across the EU can be isolated. On the one side, it seems possible to identify a conservative block in eastern and north eastern countries<sup>66</sup>, where a clear majority of interviewed disagree with the statement “my country should help refugees”. Further, it might be worth focusing on results in Italy where only 46% of interviewees disagreed with this statement. What is the more striking is that whereas Italy is the second top destination for migrants, if we focus on the first – i.e. Greece – only 13% of the interviewed deem their country should not help refugees. And it might also be worth remembering that interviewees from Italy, on the one side, find themselves at the top of the countries where migration is deemed to be the main challenge to Europe (67%, second to Czech Republic, 69% and Malta, 83%). On the other side, whilst one could expect that a disagreement for national support for refugees might be balanced by a

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<https://www.amnesty.org/en/latest/news/2016/05/refugees-welcome-index-shows-government-refugee-policies-out-of-touch/>. See also Jonnes, H., “Public opinion on the refugee crisis is changing fast – and for the better”, <https://theconversation.com/public-opinion-on-the-refugee-crisis-is-changing-fast-and-for-the-better-47064>. See also F.A.Z., “Deutsche glauben an Integration der Flüchtlinge”, 29 February 2016, <http://www.faz.net/aktuell/politik/fluechtlingskrise/umfrage-deutsche-glauben-an-integration-der-fluechtlinge-14096993.html>. By contrast, this study - and the following findings that will be discussed in turn – reveals a somewhat different attitude of public opinion: Les Européens face à la crise des migrants, [http://www.ifop.com/media/poll/3181-1-study\\_file.pdf](http://www.ifop.com/media/poll/3181-1-study_file.pdf).

<sup>65</sup> Standard Eurobarometer 84 – Autumn 2015, “Public Opinion in the European Union, First results”, December 2015, retrieved from: [http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/S\\_TANDARD/surveyKy/2098](http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/S_TANDARD/surveyKy/2098).

<sup>66</sup> See *ibidem*. To provide evidence of the mentioned assumption, the following is an extract of countries where the interviewed that disagree with the statement my country should help refugees is higher than the 50%: Bulgaria 61%, Czech Republic, 66%, Hungary, 67%; Slovakia, 58% Latvia, 55%.

favour towards EU support, another data falls short of this expectation: only 47% of interviewed take the view that the EU decision to “allocate financial support as a matter of priority to Member States currently facing the most migration flows on their coast and borders” is a “good thing”.<sup>67</sup>

With regards to Schengen States that have reintroduced internal border checks in 2015 the results are swinging, ranging from high degree of support towards refugees (Sweden, 94%; Denmark, 86%; Germany, 83%) to medium/high perception about the need their country should provide support to refugees (Austria, 62%; France, 59%; Slovenia, 54%). However, it must be noted that such data have been taken before or practically during the time when the general trend to reintroduce border controls began.

The Eurobarometer findings, however, while representing a reliable tool for giving a generic outlook of the state of public opinion on the refugee crisis, does not entail detailed information regarding policies and measures concretely undertaken at the national or EU level. To this end, a valuable study carried out by the *Ifo* represents a more analytical instrument in order to better understand the level of support for restrictive policies, as it provides data relevant to the crisis of the Schengen regime. Based on three countries (France, Germany and Italy) the study draws an unsettling scenario of elector tendencies across the EU, especially if compared with earlier results.

In general, it notices a prompt degradation of the feelings towards migrants over the course of 2015 and the first months of 2016.<sup>68</sup> Furthermore – and selecting the study’s findings accordingly with the topic of this work – it is worth mentioning the findings relevant to the Schengen suspension. First, it is commonly understood that refugees will continue arriving to Europe – and what is the more interesting – welcoming policies represent a pull effect (“*appel à l’air*”). Therefore, it may be inferred that reintroducing border controls is coherent to contrast such an effect. Moreover, it appears quite interesting that practically one German in two (51%) believes that migrants coming to Europe are asylum-seekers, whereas the remaining part deem that they are economic migrants (41%), or do not respond (8%). This is

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<sup>67</sup> See “European Parliament Eurobarometer (EB/EP 84.1) Parlemeter 2015 – Part I The main challenges for the EU, migration, and the economic and social situation”, 14 October 2015: [http://www.europarl.europa.eu/pdf/eurobarometre/2015/2015parlemeter/eb84\\_1\\_synthese\\_analytique\\_partie\\_1\\_migration\\_en.pdf](http://www.europarl.europa.eu/pdf/eurobarometre/2015/2015parlemeter/eb84_1_synthese_analytique_partie_1_migration_en.pdf), p. 17.

<sup>68</sup> See “Six mois après: les européens face à la crise des migrants”, Fondation Jean-Jaurès, 5 April 2016, <https://jean-jaures.org/nos-productions/les-europeens-face-a-la-crise-des-migrants-2>.

against any evidences so far provided by Eurostat.<sup>69</sup> Again, one may wonder if this opinion is relevant to the reinstatement of internal border checks, to the extent that it represents a useful tool to select between asylum seekers and economic migrants without residence permits. Furthermore, the hypothesis that terrorists may be hiding among refugees and migrants coming to EU coasts and land finds a wide and increasing support<sup>70</sup>, with Germany registering the greatest increase and Italy the country that registers the top level of such assumption.

All these findings are relevant to the reintroduction of internal border checks, being probably coherent to the following findings.

As anticipated, the mentioned study also covers the specific topic of internal border checks providing useful data about how public opinion reacts to the Schengen turmoil. The findings of the report are quite indicative of a restrictive shift, as electors in favour of a suspension of the Schengen regime cover a wide political area. Among Eurosceptic parties the percentage of voters in favour of reintroducing border controls is higher than the 80% in the three considered countries. However, a more striking data comes from traditionally pro-European parties, as it turns out that more than one voter in two is keen on ending – at least temporarily – the free movement area.<sup>71</sup>

What is the more interesting is that the aforementioned report takes into account polls in two out of three countries (France and Germany) that have reintroduced border checks over the course of 2015. It entails, therefore, useful indicators for the relationship between electors' attitude and one of the most relevant anti-crisis measures carried out at national level, i.e. showing wide electoral support as for government action. However, if this does not necessarily imply a restrictive attitude towards refugees (due to the cited findings in Germany and France towards refugees), it does imply – in our view – a misinterpretation of the politics the Government should adopt

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<sup>69</sup> See for a meaningful explanation Fargues, P. , “Mass Migration across the Mediterranean Interpreting the Data”, 1 March 2016, slide p. 6, <http://odysseus-network.eu/wp-content/uploads/2015/09/Fargues-on-Data-on-Migration.pdf>.

<sup>70</sup> In particular, as regards the increased perception of terrorists presence among migrants, the difference between September 2015 and March 2016 is as follows: 64% in September 2015 and 79% in March 2016 as for Germany; 69% in September 2015 and 80% in March 2016 as for France and 79% in September 2015 and 84% in March as for Italy: see *ibidem*, p. 6.

<sup>71</sup> Naturally with distinct majorities: for example, in Germany 60% of SPD voters are in favour of a Schengen suspension whereas the number increase up to the 85% among AFD voters, *ivi*, p. 12.



to cope with that issue for the reasons outlined in the previous section and in the following conclusion.

## **6. Towards a conclusion: economic challenges and the captious use to the solidarity principle**

Refugee crisis has raised new concerns over the use of internal borders control reinstatement, both because Art. 24 and 25 have been used with new scope and meaning and because of the unprecedented activation of the special procedure of art. 26 of the Code. Current proposals on the floor range from downsizing the Schengen area by means of reducing the number of States participating to abolishing the free movement area. As things stand, however, it seems hard to foresee in the short-term both outcomes. Rather, the extraordinary management of the Schengen area carried out by Schengen States and now backed by EU institutions through the activation of the special procedure under Art. 26 SBC seem to have to be framed within other political perspectives. The symbolic nature of borders and the reassuring potential they entail for public opinion may not be underestimated; it is not by coincidence indeed, that the reintroduction of internal borders checks has often affected a limited part of internal borders, with border checks being reintroduced on the parts affected by migratory routes: whereas it has not been *always* so, the case of the closure of the Öresund bridge offers a meaningful example to this end. Furthermore, we should recall that the growing success of the Schengen area has much to do with its potential to enhance the four EU economic freedoms and more generally the economic growth of its countries.

It appears crucial, therefore, and in spite of symbolic or electoral convenience, to set clearly the question of closing the Schengen experience will imply a positive, a neutral or a negative economic consequence: basing themselves on econometric models, several studies are showing that the latter is the most likely outcome. Empirical evidence has shown that the existence of a labour mobility zone has a positive impact on trade between countries as well as on imports and exports from one Schengen State to another.<sup>72</sup> What is more, in the aftermath of the refugee and Schengen crises' outbreak, other studies have been proliferating, showing the cost of a permanent

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<sup>72</sup> Davis, D., Gift, T., "The Positive Effects of the Schengen Agreement on European Trade", *The World Economy*, 2014, pp. 1541 ff.

reintroduction of internal border controls: as a consequence, cross-border workers will be firstly affected, which would imply – as it has been calculated – a cost between one and two billions euros per year; other negative repercussions include decrease in trade between Schengen States as well as a reduction in GDP within the Schengen area.<sup>73</sup>

Those data seem to be prominent indicators that, as has already occurred in the course of the EU integration, the EU market entails the potential to neutralize political conflict around the functioning of the Schengen regime. In particular, this provides further evidence to question the (cautious) use of the solidarity principle to justify the reintroduction of the prolongation of border control, as the negative repercussions for the Schengen community and the whole EU show a rather different effect: the economic costs that Schengen's suspension or termination would imply indicate rather that this is far from enhancing solidarity within the EU.

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<sup>73</sup> Aussilloux, V., Le Hir, B., “The Economic Cost of Rolling Back Schengen” [http://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/the\\_economic\\_cost\\_of\\_rolling\\_back\\_schengen.pdf](http://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/the_economic_cost_of_rolling_back_schengen.pdf) and Bohmer, M., Limberts, J., Pivac, A., Weinelt, A., Departure from the Schengen Agreement Macroeconomic impacts on Germany and the countries of the European Union [https://www.bertelsmann-stiftung.de/fileadmin/files/BSSt/Publikationen/GrauePublikationen/NW\\_Departure\\_from\\_Schengen.pdf](https://www.bertelsmann-stiftung.de/fileadmin/files/BSSt/Publikationen/GrauePublikationen/NW_Departure_from_Schengen.pdf).