



## **SCHENGEN, SECURITY AND SOLIDARITY: SENDING THE RIGHT MESSAGE TO EU CITIZENS**

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

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*Abstract: The unwillingness to acknowledge that within the area of free movement border controls are not simply abolished but are re-organised, the lack of recognition that the differentiated migration pressure which each Member State is exposed to is a consequence of this re-organization and the absence of binding and concrete obligations to show solidarity lead national politicians to resort to unilateral solutions in response to domestic demands to reassure their citizens that their security – which they still perceive to be protected better within national borders – is not being threatened by the migration crisis by demonstrating that they are in control of these borders. The inefficiency of unilateral solutions such as re-introducing internal border controls is likely to reinforce the impression among the national electorates that political leaders are not in control, leading to intensified populist pressures to further strengthen control and diminishing willingness to share responsibility for managing the external border and providing international protection. In order to save Schengen, politicians should not focus only on the economic benefits of free movement – which are perceived to accrue to specific groups such as businesses or highly mobile workers, reinforcing the populist message that Schengen serves only the elite – but on the ability of Schengen to ensure the benefits of freedom, security and justice are shared by everyone, provided that responsibilities for border management and international protection are also shared.*

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### **I. Introduction**

The abolition of border controls among EU Member States, strengthening the practical application of the principle of free movement of people, has been one of the most visible achievements of European integration. Although often presented as a corollary of the commitment in the Single European Act to complete the internal market by guaranteeing the freedom of movement of goods, services, capital and persons, such a conceptualisation obscures the impact of cooperation on matters of internal security and (re)-conceptualization of border controls which developed among Member States on an intergovernmental level, outside the framework of EU treaties since the mid-1970s. In fact, the rationale and institutional set-up of the Area of Freedom, Security and Justice without internal borders, as enshrined in the Treaties, have been influenced by such initiatives, which played the role of laboratories<sup>1</sup>. The common challenges which prompted initial cooperation in the area were concerns around terrorism and the need to coordinate policing, gradually expanding to cover organised crime as well as immigration.

Originally arising from a bilateral agreement between France and Germany to abolish border controls between the two countries, the Schengen Agreement was signed in 1985 between Germany, France, Belgium, the Netherlands and Luxembourg. It was followed by the drafting of a Convention on its implementation signed in 1990. The Convention entered into force in 1995, abolishing checks at the internal borders of the signatory states and moving them to the external border where they were to be carried out in accordance with a common procedure. This process was accompanied by the adoption of 'compensatory

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<sup>1</sup> Monar, J. (ed.), *The Institutional Dimension of the European Union's Area of Freedom, Security and Justice*, Brussels: Peter Lang, 2010.

measures' including common set of rules applying to people crossing the external borders of the EU Member States; harmonisation of the conditions of entry and of the rules on visas for short stays; establishing rules on determining responsibility for the examination of asylum requests; enhanced police and judicial cooperation as well as the establishment of the Schengen Information System (SIS).

At the same time, while having been initiated outside the treaty framework, cooperation in the area of justice and home affairs gradually became 'communitarised', with supranational institutions, including the European Commission, the European Parliament and the European Court of Justice playing an increasingly important role in decision-making and supervising the implementation of policies and qualified majority voting governing decisions in the Council of Ministers. The Treaty of Amsterdam formally incorporated Schengen into the framework of the Treaties and gave further impetus to cooperation in this area by creating the European Union's Area of Freedom, Security and Justice (AFSJ), now enshrined in the Treaty of the European Union<sup>2</sup>.

This paper will address the implications of the content and framework in which cooperation in free movement is embedded and will explain why despite the existence of both incentives and structures in which to cooperate in tackling the migration crisis, governments have nevertheless chosen to act unilaterally by re-introducing border controls, in line with demands from their citizens for more security and an increasingly negative attitude towards immigrants. It will then explore the likely consequences of such decisions, suggesting that they could potentially jeopardize the long-term functioning of Schengen. The paper will suggest what strategies national and EU politicians could adopt in order to avoid such a development.

## **II. Cooperation in the Area of Freedom, Security and Justice and the risk of populism**

Cooperation within within the AFSJ has strengthened the interdependence between the EU and Member States – vertically and horizontally. Horizontal interdependence refers to the impact of an action (or omission) of one Member State on the others. While it could be assumed that there is a certain asymmetry with regard to the ability of certain Member States – particularly those at the external border which face greater pressures on their external land

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2 Article 3 (2).

or sea borders – to make decisions which have an impact on other Member States, in particular those who do not have such external borders, this is not necessarily the case. In the current crisis challenges for Member States are thought have arisen primarily due to Greece's inability to ensure external border control is carried out in accordance with its obligations under the Schengen *acquis* and migrants are treated in accordance with EU immigration and asylum policy<sup>3</sup>. This was judged to have triggered secondary movements of undocumented migrants among Member States who were aiming to reach primarily Germany and Sweden. Hungary's decision to build a fence between Serbia and Hungary resulted in diverting the flow of persons to Croatia. At the same time, Germany's decision to apply the discretionary clause of the Dublin regulation and examine all applications by Syrian asylum-seekers even where it is not the responsible Member State in accordance with its criteria, has heavily affected the routes asylum seekers are taking, placing other Member states along the route under strain<sup>4</sup>.

Interdependence is also visible vertically, that is, between the Member States and the EU. Actions of individual Member States affect the EU – Greece's inability to manage the external borders was deemed to have put the functioning of the entire Schengen area at risk. At the same time, EU actions also affect Member States – and due to qualified majority voting sometimes against their will – as for instance the decision to introduce mandatory relocation scheme for asylum-seekers within the EU<sup>5</sup>.

Such a high level of interdependence both vertically and horizontally should foster cooperation in order to find and agree on a common and sustainable response to the situation. As explained above, cooperation in the area of free movement arose out of Member States' agreement and it was through a series of inter-governmental conferences that supranational elements gradually structured it so it could be expected that a common solution should emerge. However, instead, governments have reacted primarily through a series of unilateral actions, manifesting themselves in constructing (or threatening to construct) fences and the temporary re-introduction of border controls at internal borders, potentially

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3 Council Implementing Decision setting out a Recommendation on addressing the serious deficiencies identified in the 2015 evaluation of the application of the Schengen *acquis* in the field of management of the external borders by Greece (Council Document 5985/16 of 12 February 2016).

4 Pascouau, Y. *Heads buried in the sand: member states block solutions to the refugee crisis*, European Policy Centre, Brussels, 2015.

5 Slovakia, the Czech Republic, Romania and Hungary voting against the decision, and Finland abstained.

jeopardising free movement.

Citing a threat to internal security and public policy due to secondary movements of irregular migrants, since September 2015 eight countries – Belgium, Denmark, Germany, Hungary, Austria, Slovenia, Sweden and Norway – introduced controls at parts of their internal borders, in accordance with the possibility and procedures provided under the Schengen Borders Code (SBC)<sup>6</sup>. In May 2016, the Council recommended<sup>7</sup>, in line with Article 29 of the SBC, that Austria, Germany, Denmark, Sweden and Norway continue to maintain proportionate temporary border controls for a maximum period of six months, at parts of the internal borders, in view of the exceptional circumstances where the overall functioning of the area without internal border control was put at risk as a result of persistent serious deficiencies relating to external border control in Greece.

How can this response be explained and what are its likely consequences?

## 2.1. The (non) abolition of borders

The first reason is the lack of recognition that following the abolition of internal borders, the external borders of each EU Member State constitute also the borders of all other Member States – Greece's border is also Germany's. Certain Member States do recognize this principle – for example, Dutch law stipulates that “the borders of the Netherlands for the admission of foreigners is to be found at the edge of the frontiers of all the Schengen states”<sup>8</sup>. However, in practice, there is little appreciation among Member States that within the area of free movement, border controls are re-organised with the external borders being in fact common to all Member States who should share the responsibility for their management. Instead, an emphasis is placed on each Member State being primarily responsible for

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6 The unilateral decisions were based in all cases on Article 28 (ex Article 25) of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), concerning cases requiring immediate action, which allows the reintroduction of controls at internal borders for a period of up to 2 months. As the situation was deemed not to have improved, these controls were subsequently prolonged on the basis of Articles 25 and 27 (ex Articles 23 and 24) of the Schengen Borders Code allowing the reintroduction of controls at internal borders for a period of up to 6 months. Hungary, Slovenia and Belgium have in the meantime lifted the controls. France introduced and maintained controls in relation to the emergency state as introduced following the Paris attacks.

7 Council Implementing Decision setting out a Recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk (Council Document 8746/16 of 11 May 2016).

8 Elspeth Guild, *Moving the Borders of Europe*, inaugural lecture delivered at the official ceremony of the assumption of the professorship of the CPO Wisselleerstoel at the University of Nijmegen, on 30 May 2010, p. 2.

managing its section of the external border. Although Article 67 (2) of the TFEU envisages that EU's external border policy should be based on solidarity, so far this has been limited to financial support – delivered in the period 2014-2020 through the Internal Security Fund: Borders and Visa – and operational support through the European Agency for the Coordination of Operational Cooperation at the External Borders of the Member States (FRONTEX). These measures, however, have fallen short of compensating for the disproportionate pressures certain EU Member States at the external borders are facing due to their geographical position, the direction of migratory flows and their responsibilities under EU immigration and asylum law to provide access to the territory to those seeking international protection.

Consequently, although borders were moved to the EU level, the understanding of borders as manifestation of national sovereignty has not undergone the same transformation. The area of free movement is not composed of a European people with common borders; rather it is an area based on the mutual trust and recognition of decisions on entry or residence made by each Member State. The TFEU explicitly confirms that the geographical demarcation of borders shall not be affected by EU's policies on border control, immigration and asylum<sup>9</sup>. Moreover, the Schengen Borders Code also allows the maintenance of frontiers as points of policing<sup>10</sup> – the exercise of police powers in border areas is permitted as long as it does not have an effect equivalent to a border check<sup>11</sup>.

EU law also provides that Member States remain responsible for the safeguarding of internal security<sup>12</sup>. One of the most important symbolic functions of borders is precisely to ensure the security of those within the territory. The legitimacy of the exercise of state power within a territory is associated with its ability to provide such security. As long as the state is perceived to be firmly in charge of exercising this function, its legitimacy is not questionable. However, the moment it 'sub-contracts' this prerogative to another state, the question of trust of how this is exercised comes to the fore, with the state fearing its legitimacy may be

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9 Treaty on the Functioning of the European Union, Article 77 (4).

10 Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: Cases and Materials*, Cambridge University Press, 2010, p. 497.

11 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), Art. 23 (ex Article 21).

12 Treaty on the Functioning of the European Union, Article 72

undermined<sup>13</sup>.

Migration raises concerns in relation to internal security in two ways – the association of migrants with the commission of crime, further compounded by the criminalisation of irregular migration, and their perception as a threat to society's identity and cohesion. Cooperation among European governments has contributed to reinforcing this relationship: since its very beginning, collaboration in the area of internal security incorporated irregular migration and asylum as a concern alongside terrorism and organised crime as significant threats replacing old external threats such as conflict. Therefore, states which are not in control of external borders want to be seen as if they are in control of their own borders and can assert national sovereignty by re-introducing controls or increasing the spot-checks in border areas, within the limits of the SBC.

## **2.2. The area of free movement – imbalance and 'forced' solidarity**

Such a 'reflex' to act unilaterally – albeit within the framework provided for under the SBC which sets out specific criteria for the re-imposition of controls – is primarily due to the absence of binding rules on solidarity in relation to the management of external borders and the sharing of responsibility for persons seeking international protection<sup>14</sup>. In the absence of such rules and a common understanding of what constitutes 'fair share' of asylum applications<sup>15</sup>, each country, depending on its national interest, has an incentive to act unilaterally to ensure it does not take more than its 'fair share'. For Member States at the external borders, this is manifested through unilateral actions aimed at forcing solidarity – either through 'waving through' those arriving at its borders as has most recently been the case along the Western Balkan route<sup>16</sup> or granting them permits allowing the right to free movement throughout the Schengen area as Italy did in 2011<sup>17</sup>. On the other hand, Member

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13 Elspeth Guild *Moving the Borders of Europe*.

14 Rather than contributing to solidarity, the inherent unfairness of Dublin system, which places responsibility for the processing of asylum applications largely to Member States at the external borders on the basis of the criterion of irregular entry' undermines it.

15 In 2015, on a proposal from the Commission, the Justice and Home Affairs Council adopted two decisions to relocate 160, 000 asylum-seekers from Greece and Italy over the coming two years. In addition to being temporary and exceptional, the mechanism applies only to asylum-seekers from countries for which the average EU recognition rate is above 75 per cent.

16 European Commission, Communication from the Commission to the European Parliament, the European Council and the Council: Back to Schengen – A Roadmap, COM(2016) 120 final, 4 March 2016.

17 Sergio Carrera, Elspeth Guild, Massimo Merlino and Joanna Parkin, "A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair", CEPS, April 2011.

States which do not have external borders also try to force solidarity as they believe that due to the external borders Member States' non-compliance with their obligations, they are taking more than their 'fair share' of responsibility for asylum applications. For these countries, attempts to force solidarity are manifested in re-introducing border controls or intensifying spot checks. The actions of both sides are often inconsistent with the Schengen and Dublin rules, undermine trust and decrease the possibility of finding common solutions or implementing those agreed upon.

These actions also reflect a particular understanding of Schengen which associates it primarily with the removal of controls – hence the need for Member States to have a mechanism for re-introducing them at the internal borders and the opposition of Member States – mostly those at the external borders – to re-introducing them. In fact, instead of seeing Schengen simply as an area that eliminates controls, it would be more accurate to see it as a way of reorganising controls in order to make them more effective<sup>18</sup>. Schengen was founded on the premise of abolishing checks at the internal borders and transferring them to the external ones as well as adopting the necessary 'compensatory measures' including common set of rules applying to people crossing the external borders of the EU Member States; carrier sanctions; harmonisation of the conditions of entry and of the rules on visas for short stays; allocating responsibility for the processing of applications for international protection; enhanced police and judicial cooperation as well as the establishment of the Schengen Information System (SIS). The latter is the world's largest database of its kind, comprising information on individuals who do not have the right to enter or stay in the Schengen area, or on those who are sought in relation to criminal activities. SIS II also contains information on missing persons as well as details of certain objects such as cars, firearms, boats, and identity documents that may have been lost or stolen or used to carry out a crime<sup>19</sup>. In fact, access to the SIS was one of the most important reasons behind the decision of Switzerland, a non-EU member, to join the Schengen Agreement, despite concerns about its implications for popular images of sovereignty and independence<sup>20</sup>.

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18 Yves Bertoncini and António Vitorino, *Schengen's stress test: political issues and perspectives*, Notre Europe - Jacques Delors Institute, 16.02.2016.

19 European Commission, *Memo: Questions and Answers: Schengen Information System (SIS II)*, 9 April 2013, available at: [http://europa.eu/rapid/press-release MEMO-13-309\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-309_en.htm)

20 Sandra Lavenex, "Switzerland: Between Intergovernmental Co-operation and Schengen Association", in Marina Caparini and Otwin Marenin (eds.), *Borders and Security Governance. Managing Borders in a Globalised World*, 2006, pp. 233-251.



As cooperation in this area developed and the creation of an Area of Freedom, Security and Justice began to take shape, the security aspects became even more clearly pronounced. Some authors have even argued that there has been a re-configuration of the notion of freedom which is then used to justify the development of control and surveillance measures of people at the external borders and in their own country. Freedom is thus seen as a means of maximizing security<sup>21</sup>. That the European Union is moving towards a re-configuration of traditional border control is also evident in the concept of European integrated border management, which is based on the four-tier access control model comprising measures in third countries, such as under the common visa policy, measures with neighbouring third countries, border control measures at the external border itself as well as risk analysis, and measures within the area of free movement, including return. Article 77 (1) c) of the TFEU stipulates that the Union shall develop a policy with a view to the gradual introduction of an integrated management system for external borders.

At the national level, however, states have rarely endeavoured to explain the re-organization of borders and to communicate clearly to the public that this new model has been judged as the most efficient and effective way of ensuring security within the AFSJ. In fact, it is the implementation of various compensatory measures – as well as the absence of a common policy on legal migration – that has contributed to the present situation in Greece. In particular, due to carrier sanctions and common visa policies which do not make special provisions for asylum-seekers to access the EU and apply for international protection through safe and legal channels, such persons are forced to use the services of smugglers and enter the EU in an irregular manner, risking their lives. According to FRONTEX, in 2015, there were 1 820 000 detections<sup>22</sup> of illegal border-crossing along the external borders with the largest number of detections reported on the Eastern Mediterranean route (885 386), mostly between Turkey and the Greek islands in the Aegean Sea. The vast majority of them were persons fleeing conflict and violence from Syria, Afghanistan in Iraq. Expecting Greece to have been able to comply with its obligations concerning border control, ensuring access to the

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21 Thierry Balzacq and Sergio Carrera (eds) *Security versus Freedom? A Challenge for Europe's Future*, Aldershot, UK: Ashgate, 2006.

22 Frontex, *Risk analysis for 2016*. These detections correspond to around 1, 000 000 persons entering the EU in an irregular manner. As explained in the report “Irregular border crossings may be attempted by the same person several times in different locations at the external border. This means that a large number of those who were counted when they arrived in Greece were again counted when entering the EU for the second time through Hungary or Croatia.

procedure for granting international protection, providing the necessary reception conditions, processing asylum applications, guaranteeing the rights of those granted protection as well as returning persons found not to be in need of protection is unrealistic and unfair.

### **2.3. National political representation, populism and national 'solutions'**

National politicians, however, have not acknowledged that the particular model of organizing border controls within the AFSJ, in fact requires shared responsibility for border management as well as for processing asylum applications.

There are a number of reasons which could explain this. As demonstrated above, despite the abolition of internal borders, the significance of national frontiers for each Member State as marker of security has not diminished. Reforms of the Schengen Borders Code aimed at facilitating the introduction of border controls at internal borders in case of threat to internal security and public policy, albeit subject to a number of safeguards, have only served to reinforce the notion that such controls are necessary to ensure security within each state. The mechanism allowing the re-introduction of internal border controls where the overall functioning of the area is put at risk as a result of persistent serious deficiencies relating to external border control<sup>23</sup> further serves to legitimize the re-introduction of border controls as a response to a Member State's failure to comply with its obligations.

In addition, national politicians have little to gain from advocating shared responsibility in relation to border control at the external borders or with regard to asylum-seekers. Border control requires significant technical, financial and administrative resources but the persistent understanding of control of the external borders as primarily a national responsibility makes it unlikely that demonstrating solidarity would bring considerable political benefits domestically. One of the most significant and persistent problems that FRONTEX has faced is precisely some Member States' unwillingness to contribute technical equipment and border guards to the Agency<sup>24</sup>. Similarly, Angela Merkel's leadership in welcoming asylum-seekers and attempt to foster solidarity in the EU did not result in increased political support at home or among other Member States, with the initial exception of Austria and Sweden. On the contrary, it led to a split within CDU/CSU and the coalition

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23 SBC, Article 29.

24 Roberto Cortinovis, The Evolution of Frontex Governance: Shifting from Soft to Hard Law?, *Journal of Contemporary European Research*, 11 (3), 2015.

cabinet as well as the re-introduction of internal border controls.

Policy-making in the field of immigration and asylum is a complex process, requiring governments to balance the demands of various societal actors including business groups and human rights NGOs supporting a more liberal immigration and asylum policy with the general population's overall preference for a more restrictive one. According to the client politics model<sup>25</sup>, the costs and benefits of potential immigration policies for various societal groups determine the effectiveness of these groups in affecting official state policy. Groups, such as businesses, on which benefits of migration policy accrue, will be more effective in lobbying in favour of policies that benefit them, with little resistance from the rest of society unable to mobilize around the diffuse costs which immigration policies entail for it. However, the increased salience of an issue can mobilize large proportion of the electorate in favour or against a specific policy course, forcing the government to adopt policies in line with public opinion<sup>26</sup>. The refugee crisis has undoubtedly led to an increased salience of the issue of immigration. According to the latest data from Eurobarometer from autumn 2015, immigration is seen as the main concern of EU citizens at national level (36%), together with unemployment (36%). This constitutes a 13-point increase compared to spring 2015 and is the first time that an item not directly related to the economy has been ranked first<sup>27</sup>. This increased salience of immigration can be expected to lead to the adoption of policies in line with public attitudes towards immigration which overall appear to be negative throughout the EU, with on average 59 per cent of EU citizens stating that immigration from outside the EU evokes negative feelings among them. Although these negative attitudes vary across the EU, it is notable that – with the exception of Sweden – in countries which re-introduced border controls these negative attitudes are close to or above the EU average<sup>28</sup>.

In addition to pressures arising directly from overwhelmingly negative public opinion, the presence of populist parties casting traditional parties as part of an elite which is out of touch with the problem faced by the people, further forces governments to be 'responsive' and

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25 Gary Freeman 'Winners and losers: politics and the costs and benefits of migration', in Messina, A.M. (ed.) *West European Immigration and Immigrant Policy in the New Century*. Westport, CT: Praeger, (2002).

26 Givens, T. and Luedtke, A., *The Politics of European Union Immigration Policy: Institutions, Salience, and Harmonization*. *Policy Studies Journal*, 32:145–165, 2004.

27 Standard Eurobarometer 84, *Public Opinion in the European Union, Autumn 2015, First Results*, p. 16.

28 The percentage of citizens stating that immigration from outside the EU evokes negative feelings among them is as follows: Germany – 58%, Belgium – 64%, Austria – 64%, France – 64%, Slovenia – 76%, Denmark – 62%, Hungary – 82% and Sweden – 27%. See Standard Eurobarometer 84 *Public Opinion in the European Union, Autumn 2015, Annex*, p. 145.

adopt policies in line with the attitude of the majority of the electorate. This often clashes with demands to act 'responsibly' towards international and domestic stakeholders<sup>29</sup>. In the case of migration, the outcome is usually a more restrictive policy, introduced at the expense of human rights obligations and with little regard to the interests of European Union partners. The rise of populist parties can also contribute to a shift in the government's position – CDU/CSU's hardening stance towards immigration was also a result of increased support for Alternative für Deutschland and its success in shifting the debate towards the xenophobic right<sup>30</sup>.

In order to explain the Member States governments' decisions to act unilaterally, it is helpful to consider the governance of EU migration policy. It combines elements of both supranational and intergovernmental policy-making, with Member States retaining a prominent role. Data from Eurobarometer demonstrates that EU citizens' trust in the EU is declining; with 55 per cent of them stating that they do not trust it as opposed to 32 per cent who do<sup>31</sup>. Hence governments cannot rely on appealing to the broader European interest in order to justify the adoption of policies at the EU level which the voters may perceive as not being in line with the national interest.

Although the involvement of the European Parliament in policy-making may be seen as potentially encouraging a broader debate at the national level with a European dimension, in fact EP elections are dominated by national issues and are often seen as second-order national elections. Far-right anti-immigrant and anti-EU parties dominate the campaign and are often successful at these elections. Moreover, MEPs, elected on the basis of national lists, are accountable to their national voters, rather than to the European electorate as a whole. Far-right parties' success at mobilizing voters and shifting the discourse, in turn, results in the government being even more cautious in making compromises at the EU level, choosing instead to act unilaterally.

Although the re-introduction of controls at the internal borders may initially appear to be an appropriate solution, in line with the national belief of their function and ability to ensure migration flows are under control, such a move is unlikely to lead to the expected

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29 Rosa Balfour, Janis A. Emmanouilidis, Catherine Fieschi, Heather Grabbe, Christopher Hill, Timo Lochocki, Marie Mendras, Cas Mudde, Mari K. Niemi, Juliane Schmidt and Corina Stratulat, *Europe's troublemakers - The populist challenge to foreign policy*, EPC, 2016.

30 *Ibid.*, p. 48.

31 Standard Eurobarometer 84, *Public Opinion in the European Union Autumn 2015*, Annex, p. 55

outcome. This outcome, in case of countries at the internal borders, is the prevention of secondary movements. Despite being an important symbol of national sovereignty, the actual capacity of borders to prevent such movements is limited. Following the end of the Cold war and the war in Yugoslavia, EU Member states, which had not abolished their internal borders, were faced with a large number of asylum-seekers – in 1992 Germany received 438, 200 asylum applications. Secondary movements and in particular the submission of multiple asylum applications in different EU Member States had already been recognized as an issue necessitating cooperation among Member States to agree on a system of allocating responsibility for the examination of asylum applications, which later became the Dublin Convention<sup>32</sup>.

It should also be noted that border controls have been introduced at specific locations at the internal borders. Apart from re-erecting fences across the entire length of the border and investing the necessary resources to ensure control, no border can serve the function of preventing secondary movements to the extent governments and the public want. In addition to their negative symbolic impact, such barriers between Schengen states would adversely affect cross-border traffic, leading to significant delays and costs to businesses, commuters and tourists.

A comparison between the number of asylum applications in the UK, which is not part of Schengen and has maintained its border control on persons, with those in Schengen states shows that – with a few notable exceptions – the number of asylum requests does not differ significantly. It should be recalled that the UK has invested considerably in strengthening border controls at the UK – French border and signed a bilateral agreement aimed at managing migratory flows, in particular in Calais<sup>33</sup>. Despite these measures and its geographical position, in 2015 the UK received 38, 800 asylum applications, while 44, 660 persons sought international protection in Belgium and 44, 970 in the Netherlands<sup>34</sup>. In addition, Member States' obligations under international and European law also limit the capacity of border controls to reduce the number of asylum-seekers. The Schengen Borders Code stipulates its scope is without prejudice to the rights of refugees and persons requesting

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32 Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities, 15 June 1990.

33 Euractiv, *France and Britain to defuse Calais migrant crisis*, 20 August 2015, available at: <http://www.euractiv.com/section/justice-home-affairs/news/france-and-britain-to-defuse-calais-migrant-crisis/>

34 Eurostat, *Asylum and first time asylum applicants by citizenship, age and sex*.

international protection, in particular as regards *non-refoulement*<sup>35</sup> and contains a number of safeguards aimed at ensuring compliance with fundamental rights, including obligations related to international protection<sup>36</sup>. Moreover, the Asylum Procedures Directive stipulates that an application for international protection can be made at the border<sup>37</sup> and obliges Member States to ensure applicants have access to the procedure for examining their application<sup>38</sup>. The question of whether that Member State is responsible for the examination is to be decided in accordance with the relevant provisions under EU law, including in particular the Dublin Regulation; immediate rejection at the border would contravene EU law. In addition, the European Court of Human Rights, in a case involving Afghan nationals who had entered Italy illegally from Greece and been returned to that country immediately, has held that in order to establish responsibility for the examination of the application under Dublin, the state receiving the application has to carry out an individualised analysis of the situation of the each applicant. No form of collective and indiscriminate returns could be justified by reference to the Dublin system, which, moreover, has to be applied in a manner compatible with the Convention<sup>39</sup>.

Hence, “the introduction or removal of Schengen border controls should have no impact on the right of asylum-seekers to cross the external and (arguably) internal Schengen borders to seek asylum”<sup>40</sup>.

### III. Future Development – a Downward Spiral?

As discussed above, the re-introduction of border controls by a number of countries in the Schengen area is unlikely to achieve the objective of reducing the number of asylum-seekers on their territory. The recent reduction of the flow of asylum-seekers is primarily due not to the re-imposition of controls but to the strict measures introduced by Macedonia at its border with Greece as well as the agreement between the EU and Turkey<sup>41</sup>.

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35 SBC, Article 3 b).

36 SBC, Article 4.

37 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, Article 3 (1).

38 Ibid., Article 6

39 European Court of Human Rights, *Sharifi and Others v Italy and Greece* (no. 16643/09), 21 October 2014

40 Guild, Elspeth and Brouwer, Evelien and Groenendijk, Kees and Carrera, Sergio, *What is Happening to the Schengen Borders?*, CEPS, 2015, p. 10.

41 European Council, EU-Turkey Statement, 18 March 2016, available at:

<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>

Although it is too early to assess how long this reduction in the number of asylum-seekers reaching the EU will last, there are a number of indications that the solution is not sustainable. First, it is well-known that, in the absence of safe and legal channels to access protection in the EU, closing one route leads to people forced to flee violence and conflict to finding other, ever more dangerous routes to reach the EU and seek international protection. Concerns have been raised in particular in relation to potential new routes through Bulgaria, the Black Sea, Albania and Italy<sup>42</sup>. Following the deal between Turkey and the EU, Italy has recently seen an increase in the number of migrants rescued crossing the Mediterranean from Africa, in particular Libya<sup>43</sup>.

As the recent controversy between Austria and Italy regarding the intention of the former to build a fence at the Brenner Pass over fears that asylum-seekers would enter the country from Libya via Italy demonstrates<sup>44</sup>, national solutions such as re-introducing border controls are increasingly being seen by some Member States as a default option. The rise of far-right parties increases the likelihood that such a unilateral action will be taken precedence: Austria's governing coalition of Social Democrats and the conservative People's Party announced the fence plan after the anti-immigration Freedom Party's candidate secured a record share of the vote in the first round of the presidential election<sup>45</sup>.

Moreover, the sustainability of the EU-Turkish agreement depends on the lifting of visa requirements for Turkish citizens, as well as on the EU upholding its commitment that for every Syrian national returned from the Greek islands another will be resettled to the EU directly from Turkey. As data from the EU Commission demonstrates, Member States have been slow to implement this resettlement scheme – until 13 May 2016 only five countries had participated, resettling a total of 177 refugees<sup>46</sup>.

Challenges to the legality of the on the return of asylum-seekers and refugees from Greece to Turkey under the agreement and in particular the applicability of the concepts of '

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42 Guardian, *Balkan countries shut borders as attention turns to new refugee routes*, 9 March 2016, available at: <http://www.theguardian.com/world/2016/mar/09/balkans-refugee-route-closed-say-european-leaders>

43 BBC News, *European migrant crisis: Shipwrecks 'kill up to 700 migrants*, 29 May 2016, available at <http://www.bbc.com/news/world-europe-36408029>

44 EU Observer, *EU blocks Austria on Italy border checks*, 12 May 2016, available at: <https://euobserver.com/justice/133418>

45 Reuters, *Italy, Austria seek to calm tensions over Brenner border controls*, 28 April 2016, available at: <http://www.reuters.com/article/us-europe-migrants-brenner-italy-idUSKCN0XP1E8>

46 European Commission, *Resettlement and Relocation – State of Play*, 13 May 2016.

first country of asylum' and 'safe third country' to Turkey could also affect the sustainability of the arrangement<sup>47</sup>.

Apart from the agreement with Turkey, Member States have done little to address the pressures at the external borders. Concerning the opening of safe and legal channels to access protection, the only major initiative has been an EU resettlement scheme<sup>48</sup> under which Member States agreed to resettle 20, 000 refugees. The scheme is based on voluntary pledges and is inadequate to address resettlement needs. Other options such as issuing humanitarian visas, facilitating family reunion or private sponsorship for refugees have not been explored.

No progress has been made with regard to the development of a common EU labour immigration policy, consistent with Europe's labour market needs and competitiveness. Such a policy could contribute to reducing the migratory flows at the external borders.

The EU Commission has proposed the strengthening of external borders and developing FRONTEX into a European Border and Coast Guard Agency (EBCGA) with a shared responsibility for the management of the external borders<sup>49</sup>. Article 5 of the proposal envisages that the European Border and Coast Guard shall implement the European integrated border management as a shared responsibility of the EBCGA and of the national authorities responsible for border management, including coast guards to the extent that they carry out border control tasks.

Although clearly the recognition that the management of the external borders is a shared responsibility is necessary and corresponds to the objective of the creation of AFSJ, it is not sufficient to ensure a long-term solution, as it is not accompanied by a binding mechanism to share responsibility for those seeking international protection. As explained above, Member States are bound by their obligations under international and European law to ensure access to the asylum procedure, provide the necessary reception conditions, examine asylum applications, guarantee the rights of those granted protection and return persons found not to be in need of protection. In the absence of a mechanism to share responsibility,

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47 UNHCR, *Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept*, 23 March 2016.

48 European Council, *Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20 000 persons in clear need of international protection*, Doc 11130/15, 22 July 2015.

49 European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC*, COM(2015) 671 final, 15 December 2015.



Member States at the external borders will again be faced with disproportionate pressure, leading to unilateral actions from countries at the internal and external borders.

For the reasons identified above it can be expected that the temporary re-introduction of border controls will not lead to a decrease in the number of asylum-seekers. On the contrary, their inefficiency is likely to reinforce the impression among national electorates that their national leaders are not in control. As a result, populist pressures are likely intensify, resulting in more attempts to strengthen control at the internal borders and leading to a downward spiral which has the potential to jeopardize the long-term functioning of Schengen. Right-wing populist parties, with their anti-immigrant and anti-EU message are well-placed to profit from such a development as they had long called for stricter immigration policies<sup>50</sup>.

Needless to say this will have an impact on the governments' willingness to show solidarity in relation to external borders management and responsibility-sharing for asylum seekers. Concerning the former, re-introducing internal border controls requires significant financial investment and governments may not be willing to spend additional resources on the management of external borders, even if it is declared to be a shared responsibility, especially given the fact that border controls, if conducted in compliance with fundamental rights as required under EU law, will not reduce the number of asylum-seekers.

With regard to responsibility-sharing, in the context of intensified anti-immigrant and anti-EU discourse, governments are reluctant to implement even existing commitments related to responsibility-sharing<sup>51</sup> and are even less likely to agree on a binding, permanent mechanism as the share of asylum applications which the population is willing to accept as 'fair' decreases.

#### **IV. Saving Schengen - Strategies at the EU and national level**

So far, most arguments in favour of Schengen have focused primarily on the economic costs of non-Schengen. These concern in particular the impact on trade, commuters, tourism as well as the additional costs related to the re-introduction of border controls. The Commission highlights that the highest and most immediate impact of border

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50 Rosa Balfour at al., *Europe's troublemakers - The populist challenge to foreign policy*, p. 47.

51 Only 1, 500 persons have been relocated so far under decisions adopted in September 2015 by the Justice and Home Affairs Council to relocate 160, 000 asylum-seekers from Greece and Italy. See European Commission, *Resettlement and Relocation – State of Play*, 13 May 2016.

controls would be felt by the road haulage sector, with the increased costs associated with delays due to such controls having an especially pronounced impact on some sectors such as agriculture<sup>52</sup>.

In addition, studies have estimated that reintroducing border controls would have a significant impact on the 1.67 million cross-border commuters, with the total cost per year amounting to €5.2 billion<sup>53</sup>. Furthermore, according to the Commission, “at least 13 million tourist nights could be lost in the EU due to the reduction of intra-Schengen tourist trips caused by cumbersome border controls, with a total cost of €1.2 billion for the tourism sector”<sup>54</sup>. Finally, it is estimated that the administrative costs associated with border controls would amount to between €0.6 and €5.8 billion, with investment in the necessary infrastructure expected to add several billion<sup>55</sup>.

While it may be beneficial to also emphasize the cost of introducing long-term systematic internal border controls, this argument is unlikely to convince the majority of the population as it focuses on the potential costs accruing to specific groups: businesses involved in cross-border trade, highly mobile workers or tourists. All these groups make up a relatively small percentage of the population in each country – hence; the argument actually strengthens the perception that free movement benefits a relatively small percentage of the population, while the perceived costs fall on 'ordinary people'. There is a risk that solely relying on such arguments would reinforce the message of populist parties that Schengen only benefits the elite and not the general population. These parties draw support from those disillusioned with politics and are likely to be able to exploit concerns related to unemployment: the unemployed poor are also often the least mobile strata of society<sup>56</sup>. Coupled with messages from national politicians that significantly overplay the effectiveness of internal border controls in dealing with increased migratory flows at the external borders, there is a risk that the majority of the population would perceive the balance to be in favour of such controls, posing a serious challenge to the long-term functioning of Schengen.

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52 European Commission, Communication from the Commission to the European Parliament, the European Council and the Council: Back to Schengen – A Roadmap, COM(2016) 120 final, 4 March 2016.

53 Anna auf dem Brinke, *The Economic Costs of Non-Schengen, What the Numbers Tell us*, Institut Notre Europe, 2016.

54 European Commission, Communication from the Commission to the European Parliament, the European Council and the Council: Back to Schengen – A Roadmap, COM(2016) 120 final, 4 March 2016.

55 Ibid.

56 Roderick Parkes, Daniela Schwarzer, *The Divisiveness of Mobility: Fuelling Populism in the Euro and Schengen Areas*. SWP Comments, 2012.



In order to avoid this, national and European politicians should help restore confidence in Schengen in particular by reassuring citizens that it is capable of delivering both the freedom and security they demand. Using a simple, non-technical language, the 'compensatory measures' which are an integral part of cooperation and a pre-condition for the abolition of internal controls should be explained. Resisting an incentive to suggest that the re-introduction of internal borders can constitute a solution to the current increase in migration flows facing the EU, it would be beneficial to clarify how the challenge of mixed migration can be met more effectively using the tools available to the EU.

The issue of borders is indeed central. As long as citizens place more faith in their own national borders as being capable of ensuring the orderly management of migration, governments will act in a way to re-assure them that they are well-protected, thereby reproducing and strengthening this notion. Such a conceptualization of borders, however, does not correspond to the underlying principles of the Area of Freedom, Security and Justice, which sees the external borders as the main points at which entry is controlled. The concept of the European integrated border management, which is based on the four-tier access control model, comprising measures in third countries, measures with neighbouring third countries, border control measures at the external border itself as well as risk analysis, and measures within the area of free movement denotes a re-organization of border controls, not their abolition.

Politicians need to send a consistent and truthful message to EU citizens, emphasizing that the external borders of the EU are indeed common, and their management should be a shared responsibility. This also implies sharing responsibility for guaranteeing that those in need of international protection have access to the EU and to a fair and efficient asylum procedure, and, if found to be in need of international protection, to the enjoyment of the rights which it entails. This message should clarify that it is precisely because of EU's policy on borders, asylum and immigration that countries at the external borders experience disproportionate pressure both on their borders and their asylum systems.

While Schengen provides the necessary tools to ensure both security and freedom, the link between immigration and asylum on the one hand and threats to internal security such as crime and terrorism, on the other should be severed. Police and judicial cooperation as well as the use of technology, including the SIS can be very effective in providing security. Dealing with immigration and asylum requires a different approach.

Concerning international protection, it is necessary to recognize that, alongside tackling the root causes forcing people to flee, creating safe and legal channels to access protection in the EU is a viable way of discouraging people from relying on smugglers and undertaking risky and life-threatening journeys and will also reduce the pressure at the external borders. A large-scale EU resettlement scheme, lifting visa and carriers sanctions, issuing humanitarian visas, and simplifying family reunion policies could be implemented. Such measures, of course, should not affect Member States' obligations under international and EU law to grant access to the territory and the asylum procedure to applicants at the border.

States should also recognize the growing mobility aspirations of 'economic' migrants and their willingness and ability to act on these<sup>57</sup>, as well as their own demographic challenges and skills shortages. As stated by the Commission, a European policy on legal migration is necessary both as part of efforts to reduce irregular migration and to maintain competitiveness<sup>58</sup>. Despite the difficulty of advocating for such a policy in a situation of high unemployment and social anxiety, politicians should not hesitate to support it while, at the same time, showing an understanding of the citizens' concerns regarding its impact.

## V. Conclusion

The current migration crisis has exposed the interdependence of various actors at the national and EU level, demonstrating that decisions taken at each level necessarily have an impact both vertically, at the EU and Member States level and horizontally, between Member States.

While this interdependence and the long-standing cooperation of Member States in the area of free movement, conducted within an increasingly supranational framework, should have resulted in all actors collaborating in finding a common response, this has not been the case. The paper has argued that it is Member States' unwillingness to recognize that within the area of free movement, border controls are not simply abolished but are re-organised with the external borders being in fact common to all Member States who should

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57 Demetrios G. Papademetriou, *Maintaining Public Trust in the Governance of Migration*, Migration Policy Institute, 2016.

58 European Commission, *Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European Agenda on Migration*, COM (2015) 240 final, 13 May 2015.

share the responsibility for their management that can explain the lack of a common European response. The lack of recognition that the differentiated migration pressure which each Member State is exposed to is a consequence of this re-organization and the absence of binding and concrete obligations to show solidarity lead national politicians to resort to unilateral solutions in response to domestic demands to reassure their citizens that their security is not being threatened. Such decisions are demanded by and resonate with the domestic electorate because despite the abolition of internal borders, the significance of national frontiers for each Member State as marker of security – which migration is perceived to threaten – has not diminished. The increased salience of migration mobilizes large proportion of the electorate in favour of or against a specific policy course, leading the government to adopt policies in line with public opinion, which is increasingly negative towards immigrants. Pressures from far-right populist parties further restrict the governments' scope for manoeuvre, forcing them to demonstrate they are 'responsive' to the electorate and in control, often at the expense of acting 'responsibly' towards international and domestic stakeholders.

The 'solutions' – re-introducing internal border controls or increasing spot-checks – are unlikely to produce the expected outcome of reducing the number of asylum-seekers; on the contrary, their inefficiency is likely to reinforce the impression among the national electorates that political leaders are not in control. As a result, populist pressures are likely intensify, leading to more attempts to strengthen control at the internal borders and reducing both the willingness and the ability of Member States to show solidarity with countries at the external borders of the EU by contributing to efforts to manage these borders and through responsibility-sharing for persons in need of international protection.

The paper has suggested that in order to prevent this downward spiral, which has the potential to jeopardize the functioning of Schengen, the message sent to the European citizens by European and national politicians has to be consistent and truthful and needs to emphasize how the external borders of the EU are indeed common, with the Schengen *acquis*, including its 'compensatory measures' representing the most efficient way of ensuring freedom, security and compliance with international obligations within the AFSJ. While it may be beneficial to also emphasize the cost of introducing long-term systematic internal border controls, this argument is unlikely to convince the majority of the population as the benefits of free movement are largely perceived to accrue to specific groups: for example, businesses



involved in cross-border trade, tourists or highly mobile workers while the perceived costs are felt to fall on the rest of the population. Solely relying on such an argument risks supporting the message of populist parties that Schengen only benefits the elite and not the general population. On the contrary – shared responsibility is the only way to ensure the benefits of freedom, security and justice are shared by everyone.