

CHAPTER XI

SCHENGEN AREA AND MASS MIGRATIONS: THE END OF A DREAM?



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Abstract

The idea of Schengen as a vast area without (inner) borders has been active since 1984. For a long time, the idea of a “borderless Europe” thrived because external borders of the Schengen area were adequately protected. However, after 2005, when it was said that Schengen had come to epitomise freedom, security, and European success, the first cracks in the mutual trust among the Member States began appearing and became obvious in 2011 during the French-Italian row when France introduced border controls with Italy. The migrant crisis in 2015 with the reintroduction of numerous (and long lasting) inner border controls showed how the Schengen area is in reality fragile. This chapter deals with the current situation in the Schengen area and tries to show whether Schengen can survive as an undisputedly important achievement in the process of Europeanisation. However, while coping with the shortcomings of Schengen and establishing stronger and more efficient controls on the external border, protection of individual human rights must not be neglected.

Keywords: Schengen, Schengen Border Code, migrations, border controls, human rights.

Frane Staničić (2024) ‘Schengen Area and Mass Migrations: The End of a Dream?’. In: Anikó Raisz (ed.) *Migration and Central Europe. Challenges and Legal Responses*, pp. 439–462. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2024.armace_11

1. Introduction

What is Schengen, and what it is about? I feel this question should be the focus of this chapter. The idea of Europe without (inner) borders is a noble one, but global developments and those within the European Union (EU) itself challenge this idea significantly. These developments include, for example, “temporary” suspensions of Schengen that last for years and politicians’ statements that Schengen is not working.¹ This is the state of the world (and the EU) in which we live because of the unprecedented influx of migrants towards and through the outer border of the EU and increasing problems within the Member States regarding integration of migrants into their respective societies.² There are, of course, disagreements between Member States, such as on the migration and asylum policies and their development. Therefore, what is Schengen, and what is it about? Or even better—what should Schengen be, and what it should be about? What is the role of Schengen rules in the framework of EU law? What happened over time that we walked the path from the 2005 proclamation that ‘Schengen had come to epitomise freedom, security, and European success’³ to ‘Schengen is not working’? Schengen rules were set as a tool for combating unlawful (irregular) migrations and ensuring that only individuals that meet the set conditions for entry are admitted into the EU. This was and is necessary to ensure a Europe without inner borders. Two principal theories of European integration—intergovernmentalism and neofunctionalism—consider the abolition of border controls in the Schengen area as a key area of integration.⁴ However, freedom to travel across the continent without the hassle of checks at internal borders is linked with the need to provide greater security⁵ (at the external border).⁶ The debordering process is one of the main achievements of EU regional integration, although it has also stirred up anxieties among the population that revolve around transnational crime and irregular migration as well as loss of identity.⁷ Now, even EU institutions—which have traditionally been seen as defenders of the free movement—have expressed criticism regarding open borders.⁸ In light of recurrent

1 Skaro, 2023.

2 A recent Eurobarometer survey, ‘Integration of Immigrants in the European Union’, shows that the citizens feel that integration is crucial for migrants. European Commission, 2022b, p. 5.

3 Luc Frieden, then President of the EU Justice and Home Affairs Council, on when celebrating the 20th anniversary of the signing of the Schengen agreements in Luxembourg. See in Zaiotti, 2011, pp. 537–538.

4 Salomon and Rijpma, 2023, p. 282.

5 In Saarbrücken and Schengen, the main objective was to make easier the cross-border formalities from the perspective of completion of the internal market. This aim was boosted in 1987 by the Single European Act. However, the fall of the Berlin Wall in 1989 and the end of the Cold War changed the overall perspective by highlighting the need for more security-related measures as part of Schengen cooperation. De Capitani, 2014, p. 106.

6 Zaiotti, 2011, p. 538.

7 Gülzau, 2023, p. 786.

8 Ibid.

crises, several Member States have reinstated internal border controls to compensate for the perceived risks evoked by unwanted immigration, terrorism, and the spread of COVID-19.⁹ Moreover, public perception of migration also has had a role in building legal regulation for migration. Some find that public discourse on the impact of migration, in which media outlets themselves have played an important role, have spun out of control. Media attention towards immigration has increased significantly, and negatively valenced frames have become dominant in EU Member States during the past two decades.¹⁰ Namely, citizens regard the absence of border controls as a threat to the working of the national way of life, to which their customs, traditions, and morals are linked.¹¹ Some link migrations to negative domestic outcomes, such as rising labour market competition and crime. One main issue with the implementation of Schengen rules is the simultaneous protection of individuals' human rights, especially the right to asylum. Therefore, security measures at external borders have long been a highly contested issue. An additional question has arisen because of the increased number of reinstated border controls between Member States and the fear this could mean the end of Schengen. However, the future fate of the Schengen area is, in reality, a story about mutual trust. Member States must reaffirm their mutual trust, which means that inner Member States must be convinced that external Member States can control the external border in a manner that safeguards their inner counterparts as well. When and if this is achieved, we will no longer talk about whether Schengen faces the danger of failure.

2. History of the Schengen area

The project of establishing an area without internal borders has been at the core of European integration since the Treaty of Rome.¹² The so-called “Schengen area” now covers more than 4,300,000 km², stretching from the Arctic to the shores of the Mediterranean. Within it, almost 420 million people can cross the internal borders of 27 European countries.¹³ The Schengen system was originally developed outside the European Community framework. It found its origins in an intergovernmental arrangement¹⁴ between representatives of five Member States—France, Germany, Belgium, Luxemburg, and the Netherlands—aimed at advancing

9 Ibid.

10 See in Karstens, 2020, p. 45.

11 Karstens, 2020, p. 48.

12 Salomon and Rijpma, 2023, p. 288.

13 De Capitani, 2014, p. 102.

14 The Schengen acquis—Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the Gradual Abolition of Checks at their Common Borders, 14 June 1985.

more quickly towards the objective of lifting the internal border controls between them.¹⁵ A key document on abolishing border controls in the 1980s was the 1985 white paper titled, ‘Completing the Internal Market’ by the European Commission (or “Commission” hereafter).¹⁶ Controls at the internal borders between EU Member States have been formally abolished since the entry into force of the Convention Implementing the Schengen Agreement (CISA) on 26 March 1995.¹⁷ Moreover, since the implementation of the Treaty of Lisbon, objectives of Schengen cooperation have also been detailed in Art. 77 of the Treaty of the Functioning of the EU. The link between the freedom of movement and abolition of internal border checks on the one hand and the notion of European citizenship on the other is now grounded in Art. 21 of the Treaty on the Functioning of the EU, in Art. 45 of the Charter of Fundamental Rights of the EU; it is again detailed in Art. 77 of the Treaty of the Functioning of the EU.¹⁸

The Schengen Convention is the best-known legal document in relation to cooperation under Schengen. The document is officially known as the CISA, but it is often referred to as the Schengen Convention. The original Schengen Agreement dates from 1985 and aimed at abolishing checks at the common borders between participating countries. The CISA itself was signed on 19 June 1990.¹⁹ During the early period of cooperation under Schengen, the EU started to develop a justice and home affairs policy. As a result, it became necessary to amend the Schengen Convention even during early cooperation under Schengen.²⁰ After 1990, the prevention and combat of irregular migration and establishment of a Europe-wide mechanism to deal with asylum seekers—as foreseen in 1990 by the Dublin Convention and CISA itself—also became priorities within the European Communities’ framework.²¹

At the time of its integration into the EU, the Schengen area comprised 10 countries, while the five Nordic countries were in the process of integration.²² Evolution of the Schengen Convention since the integration of cooperation under Schengen within the EU has been subject to two different forces: further development of the Schengen *acquis* and disappearance of the elements that were not considered essential.²³ The first step was taken in 1992 when the Maastricht Treaty created the EU, and in 1997, EU Member States decided to integrate Schengen cooperation into

15 Carrera, Colombi, and Cortinovics, 2023, p. 18.

16 The Single European Act was adopted to enable the completion of the internal market as envisaged by the white paper. It inserted Art. 8a into the European Economic Community Treaty, which defined the internal market as ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty’ See Salomon and Rijpma, 2023, p. 289.

17 Salomon and Rijpma, 2023, p. 281.

18 De Capitani, 2014, p. 103.

19 Huybreghts, 2015, p. 380.

20 This was done by the Dublin Convention of 15 June 1990 and the Bonn Protocol of 26 April 1994. Huybreghts, 2015, p. 380.

21 De Capitani, 2014, p. 107.

22 Huybreghts, 2015, p. 381.

23 Huybreghts, 2015, p. 383.

the objective of developing the EU as an area of freedom, security and justice, as foreseen by the Treaty of Amsterdam.²⁴ With the entry into force of the Treaty of Amsterdam on 1 May 1999 the Council of the EU (or “Council” hereafter) defined the Schengen acquis with Council Decisions 1999/435/EC²⁵ and 1999/436/EC.²⁶ After ratification by the five founding countries, development of the Schengen Agreement can be divided into two periods. The first period is from 1985 to 1997. The second period is from 1997 to the present.²⁷ The Schengen area also expanded after each enlargement of the EU, although some new Member States cannot meet part of the requirements of a Schengen state and may need to wait until these conditions are satisfied.²⁸ One must mention one landmark decision of the Court of Justice of the European Union (CJEU)—the *Wijzenbeek* case²⁹—in which the court distinguished between the existence and exercise of the free movement rights of citizens. It clearly stated that the exercise, and not the existence, of citizens’ free movement rights presupposes EU legislation on external borders.³⁰ The CJEU thus recognised, albeit implicitly and subject to the conditions of flanking measures, such a right to free movement based on the provision on EU citizenship. It also upheld the distinction between free movement rights in the market and political spheres. By connecting the latter to the abolition of border controls, the court created a link between the Maastricht Treaty’s intergovernmental third pillar on justice and home affairs and its supranational community pillar and confirmed the link between the abolition of border controls and EU citizenship.³¹ The Treaty of Amsterdam had entered into force on 1 May 1999 and incorporated the abolition of border controls into the EU legal order. It did so in two ways.³² First, the Treaty of Amsterdam incorporated the Schengen acquis into EU law through Protocol No. 2,³³ and second, it established a link between citizens and the Schengen acquis by including the area of freedom, security, and justice as an objective of the EU into the treaty framework.³⁴ The Lisbon Treaty further elevates the political dimension of free movement in two ways: It

24 De Capitani, 2014, p. 107.

25 Council Decision of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis; OJ L 176, 10 July 1999.

26 Council Decision of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis; OJ L 176, 10 July 1999.

27 Wang, 2016, p. 701.

28 Ibid.

29 *Wijzenbeek*, Case C-378/97 of 21 September 1999. See also case C-85/96, *María Martínez Sala v. Freistaat Bayern*, 1998 E.C.R. I-02691.

30 Salomon and Rijpma, 2023, p. 296.

31 Ibid.

32 Ibid.

33 Protocol No 2 annexed to the Treaty of Amsterdam, Protocol integrating the Schengen acquis into the framework of the European Union, Art. 2, 1997; OJ (C 340) 93.

34 Salomon and Rijpma, 2023, p. 297.

proclaims that the area of freedom, security, and justice does not constitute internal frontiers and explicitly links the area to EU citizenship.³⁵

The Schengen Borders Code (SBC)³⁶ regulates the functioning of the “borderless area.” Member States have abolished internal border controls and relocated border enforcement to the external border and other ports of entry (e.g. airports).³⁷

Since its creation, Schengen cooperation has focused on the exchange between Member States through the Schengen Information System (SIS) of alerts dealing with information considered relevant in cross-border cooperation.³⁸ It also contains alerts on missing persons, particularly children, as well as information on certain property, such as banknotes, cars, vans, firearms, and identity documents, that may have been stolen, misappropriated, or lost.³⁹

3. SBC as a barrier for illegal migration and reintroduction of temporary border controls

Cornelisse⁴⁰ nicely stated that crises serve as litmus tests—they can bring to light hidden frailties and institutional flaws of any arrangement, but alternatively, they may testify to the resilience and strengths of a system. The normal functioning of Schengen was usually taken for granted and as a reason for maintaining the absence of border controls.⁴¹ It was widely accepted that, even in the case of a massive influx of migrants, Schengen could be maintained through the strict application of its working provisions.⁴² However, migrations showed their detrimental effect on the concept of a “borderless Europe” as early as 2011 with the now-famous

35 Salomon and Rijpmma, 2023, p. 300. See also Joined cases C-412/17 and C-474/17, *Bundesrepublik Deutschland v. Touring Tours und Travel GmbH and Sociedad de Transportes SA*, ECLI:EU:C:2018:1005, Judgment of 13 December 2018.

36 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) (codification); OJ L 77, 23.3.2016.

37 Gülzau, 2023, pp. 785–786.

38 De Capitani, 2014, p. 103.

39 It is worth noting that the decision about whether put a particular alert on the SIS is still at the discretion of each Member State (Art. 94 of CISA). This means that information of a similar nature may undergo a differing assessment in accordance with the security policies of each state. It is worth noting that since its creation, the SIS has been built on a strong data protection regime (Arts. 102–118 of CISA) with a Joint Supervisory Body that has recently been replaced by the European Data Protection Supervisor in cooperation with national data protection authorities. De Capitani, 2014, p. 105.

40 Cornelisse, 2019, p. 741.

41 European Commission, 2013, p. 3.

42 Ceccorulli, 2019, p. 305.

French-Italian governments' controversy.⁴³ As Schengen is often cherished as one of the most precious achievements of European integration in research, media, and political discourse, this dispute caused a stir around Europe.⁴⁴ However, instead of launching infringement proceedings against both governments, and despite evidence showing the incompatibility of both the Italian and French governments' actions with EU Schengen rules, the European Commission decided to propose a new legislative package under the title 'Schengen Governance Package' in mid-2011.⁴⁵ The reform, despite the hesitation of some EU Ministries of Interior, was successfully adopted in 2013. It essentially meant securing a stronger EU supervisory approach or more EU-level checks and balances and evidence-based decision-making over the previous EU Member State Ministries' intergovernmental-driven model; this previous model had so far prevailed in the Schengen governance as regards the rules and practices covering internal border checks and evaluation of Schengen *acquis*'s implementation.⁴⁶

It should be mentioned that, during the nine years preceding 2015 and the migrant crisis, Member States reintroduced border controls a total of 40 times; in the following five years—September 2015 to October 2020—this number rose to 237.⁴⁷ In the *State of Schengen Report 2022*, the European Commission reported that internal border controls between Schengen states have been reintroduced more than 280 times since September 2015.⁴⁸ This shows that the Schengen system has been put to test by various crises, which have led to *ad hoc* political discussions around Schengen. It has become more evident than ever that the achievements of Schengen should not be taken for granted. All recent challenges have placed the spotlight on the need to take decisive steps to improve the Schengen area's governance structure so as to safeguard its well-functioning.⁴⁹

In September 2015, Germany, Austria, Denmark, Sweden, and Norway decided to reintroduce checks at internal borders. The reintroduction of border checks was

43 Following an increase in the number of unauthorised entries by nationals of some North African countries considering emerging tensions and instability during what came to be known as the "Arab Spring," the Italian authorities started issuing humanitarian residence permits allowing beneficiaries to move freely inside the Schengen area, and in the first instance to France. This provoked a diplomatic row between the two Schengen countries, with the French government reacting by unilaterally reintroducing internal border controls with Italy. See Carrera, Colombi, and Cortinovics, 2023, p. 19, and, especially, Zaiotti, 2013.

44 Votoupalova, 2019, p. 75.

45 Carrera, Colombi, and Cortinovics, 2023, p. 19.

46 Carrera, Colombi, and Cortinovics, 2023, p. 20.

47 Salomon and Rijpma, 2023, p. 282.

48 European Commission, 2022a, p. 10.

Of course, a special crisis arose with the COVID-19 pandemic. During March–June 2020, border checks at internal borders were often applied as a first aid measure, and 17 Member States reintroduced border checks in an (unsuccessful) attempt to contain the further spread of COVID-19.

European Commission, 2021, p. 11.

49 European Commission, 2022a, p. 1.

interpreted as the dislocation of the Schengen area and as a “Schengen crisis.”⁵⁰ In France, before the “migrant crisis” reached its peak, French authorities decided to reinforce controls at its southeast border with Italy in June 2015.⁵¹ During the 2015–2021 period, Schengen area saw persistent border checks at internal borders in six Member States (France, Austria, Germany, Sweden, Denmark, and Norway), which repeatedly prolonged these border checks due to different threats (migration, terrorism, and shortcomings at the external borders). These border checks were prolonged repeatedly despite evolution of the situation: relevant circumstances had changed (e.g. change in migratory patterns removing the pressure from some border sections and evolution of terrorist threats towards the “single wolf” type), the intensity of specific threats decreased considerably (with the number of irregular migrants currently at a level comparable to the period preceding 2015/2016 which, together with other measures taken in related areas, should reduce the problem of secondary movements), and counter-measures were adopted at the EU and national levels to reinforce the external borders.⁵²

Uncontrolled migratory inflows indeed tested the EU, revealing an unwillingness among the Member States to coordinate actions. Accordingly, normalisation of the Schengen area and lifting of temporary internal border controls started to become the Commission’s key priorities.⁵³ The Commission pointedly noted that ‘it is a strong external border which allows us to free up our internal borders through the Schengen area, and to guarantee free movement of people’.⁵⁴ The rapidly worsening situation in the following months was reflected in the Commission’s documents urging Member States to fully and immediately implement the already agreed upon provisions. In response to the exceptionally high winter migratory inflows into the EU, especially Greece, it became much more urgent that the EU and Member States accelerate the implementation of the hotspot system and relocation scheme to alleviate the burden on frontier states, facilitate the return of irregular migrants, and improve national reception capacities.⁵⁵

The new SBC provisions significantly reduced the margin of manoeuvre for EU Member States to have the discretion in unilaterally reintroducing—and indefinitely prolonging—internal border controls and derogating free movement. Similarly, the new Schengen Evaluation and Monitoring Mechanism (SEMM) provided an EU-wide-model, led this time by the European Commission. It consists of a professionalised assessment and peer-to-peer evaluation system going far beyond the previous intergovernmental or Member States-led SEMM. The previous SEMM was in the exclusive hands of the EU Justice and Home Affairs Council, where the Commission participated exclusively as an observer, and the European Parliament

50 Colombeau, 2020, p. 2258.

51 Colombeau, 2020, p. 2259.

52 European Commission, 2021, p. 16.

53 Ceccorulli, 2019, p. 308.

54 European Commission, 2015, p. 13.

55 Ceccorulli, 2019, p. 309.

was completely excluded.⁵⁶ The post-2013 shapes of the SBC and SEMM secured stronger EU supervision and substantially diminished the discretion of Member States' Ministries of Interior and the EU Justice and Home Affairs Council in the overall functioning of Schengen governance. Crucially, the European Parliament and EU democratic accountability were also "winners" during the 2011–2013 legislative Schengen reform. For instance, in reintroducing internal border controls, EU Member States committed to keeping the European Parliament informed and notified of the key elements and evidence justifying the legitimacy of derogating the Schengen border free mobility under Arts. 27, 28, and 29 of the SBC. Moreover, the Parliament acquired the status of de facto co-legislator on this and any subsequent SEMM legislative reforms.⁵⁷

3.1. Reintroducing border controls between Member States: Legal regulation

The function of Schengen and the main principle of the SBC is ensuring no border controls between Member States. Internal border controls have been abolished within the Schengen area, but states have retained the right to reinstate temporary border controls in case of serious threats to public policy or internal security. Namely, the Commission has repeatedly stated that abolition of internal border controls cannot come at the expense of security.⁵⁸ Therefore, effective removal of internal controls is only possible through tightening of the common external border. This has compelled Schengen frontier states to assume the responsibility for controlling the EU's common external border on behalf of the other Schengen states.⁵⁹ Yet, the European Commission equally realised that safeguarding the freedom of movement must not compromise a Member State's ability to deal with serious threats to the public policy or security. Consequently, to ensure the acceptance and functioning of Schengen, provisions were made that allowed Member States the ability, in exceptional circumstances, to reintroduce border controls when a threat to the public policy or internal security arose.⁶⁰

For a long time, such internal border controls were only reintroduced for specific events such as political meetings or sports events, and only for a few days.⁶¹ Art. 25 of the SBC provides that a Member State may reintroduce border controls at its internal borders when there is a serious threat to public policy or internal security in a Member State. Of course, this measure was construed as a temporary (as

⁵⁶ Carrera, Colombi, and Cortinovics, 2023, p. 20.

⁵⁷ Carrera, Colombi, and Cortinovics, 2023, p. 21.

⁵⁸ European Commission, 2018.

⁵⁹ Ceccorulli, 2019, p. 304.

⁶⁰ Ibid.

⁶¹ Gülzau, 2023, p. 786.

short as possible in duration) measure of last resort.⁶² The SBC distinguishes between foreseen threats, such as major sporting events or political gatherings, in Art. 25 and unforeseen circumstances, such as terrorist attacks, in Art. 28.⁶³ In the case of foreseen threats, the initial period of reintroducing controls is a maximum of 30 days and can be prolonged to a maximum of six months; in situations that are urgent, the initial period is up to 10 days, with the possibility of prolonging it to a maximum of two months (see Art. 28). Art. 29 of the SBC must be mentioned as it also allows for temporary reinstatement of internal border controls. Namely, it prescribes that if the overall functioning of the area without internal border control is put at risk because of persistent serious deficiencies relating to external border control, the Council may recommend that one or more Member States decide to reintroduce border control at all or at specific parts of their internal borders. This can last for a period of up to six months. This period may be prolonged, no more than three times, for a further period of up to six months if the exceptional circumstances persist.

According to the SBC, Member States must notify the European Commission when they plan to conduct border checks at an internal border. The SBC also requires Member States to report the duration, scope, and reason for the reintroduction of temporary border controls.⁶⁴ These notifications have been publicly available⁶⁵ since 2006.⁶⁶

Some authors believe that the failure to lift internal border controls translates into a lack of meaningful evidence and objective data on the actual scope of the issues at stake, with no sound claim regarding the reached or expected impacts of asylum seekers' intra-EU mobility or why some of them actually constitute 'serious threats to public policy and security'.⁶⁷ Moreover, they find that there is still a noticeable shortage of evidence about the actual reasons for reintroducing internal borders controls and their effects in the latest notifications.⁶⁸ In addition, it was true that the Commission has been extremely reluctant in using its supervisory powers to protect borderless travel in Europe, although the SBC itself states that if the

62 However, the option of suspending Schengen was viewed as a last resort of limited duration. It was also recognised that, independent of a Member State's ability to exert effective control on the external border, crossing of the external border by an uncontrollable influx of third-country migrants could cause 'unexpected and significant' secondary movement of irregular immigrants. This may constitute a serious threat for the EU or some Member States. In this circumstance, reintroduction of internal border controls, though as a last resort, would be a feasible policy option. Ceccorulli, 2019, pp. 304–305.

63 Salomon and Rijpma, 2023, p. 284.

64 Gülzau, 2023, p. 787.

65 From October 2006. European Commission, 2024, pp. 1–35.

66 Although several European leaders have questioned the tenability of the Schengen rules or openly called for their overhaul, 26 Member States generally notified the Commission and Council and sought to justify the reinstatement of controls under the existing derogation grounds. In their notifications, Member States invoke related but slightly different public policy and internal security concerns and, thereby, alternate between different exception grounds. In addition, Member States maintain that the reintroduction of border controls cannot be limited to the temporal limitations of the SBC in case of prolonged threats. Salomon and Rijpma, 2021, p. 286.

67 Carrera, Colombi, and Cortinovics, 2023, p. 30.

68 Ibid.

Commission has doubts about the necessity or proportionality of reintroducing border controls, it 'shall issue an opinion to that effect'.⁶⁹ The Commission conducted its first systematic evaluation of the reinstatement of border controls in 2021 and presented its proposal for an amendment in the SBC in late 2021.⁷⁰

The CJEU ruled in April 2022⁷¹ that Art. 25(4) of the SBC must be interpreted as precluding temporary reintroduction of border control at internal borders by a Member State based on Art. 25 and 27 of the SBC if the reintroduction exceeds the maximum duration of six months, as set in Art. 25(4), and no new threat exists that justifies applying afresh the periods provided for in Art. 25. It also ruled that Art. 25(4) of the SBC must be interpreted as precluding national legislation by which a Member State obliges person, on pain of penalty, to present a passport or identity card upon entering the territory of that Member State via an internal border, when reintroduction of the internal border control in relation to which that obligation is imposed is contrary to that provision.

However, as can be seen in Annex 1 of this chapter, Member States extend border controls notwithstanding the cited judgement of the court, and the Commission has not opened infringement procedures.⁷² However, maybe the answer is in what Zaiotti wrote: In order to go beyond the instrumental vision of agency advocated by the mainstream literature on political myth-making, it is necessary to stress the practical aspect of social reality over the symbolic/ideational.⁷³ It is also worth noting that European spaces are not restricted to what is included in the EU integration project.⁷⁴ For example, Europeanised spaces such as the Single Market and Schengen, in addition to promoting the idea of deeper EU integration, foreground the incomplete nature of this process (the Single Market extends beyond the borders of the EU, and not all EU members are in Schengen, and some Schengen members are not part of the EU).⁷⁵

4. Commission's 2021 proposal for amendments to the SBC

In her State of the Union 2020 address, President von der Leyen announced a new strategy for the future of Schengen with a view to restore the four freedoms 'in full and as fast as possible'.⁷⁶ In the Pact on Migration and Asylum, the Commission

69 Salomon and Rijpma, 2021, p. 286.

70 See European Commission, 2021, pp. 150-160.

71 Joined Cases C-368/20 and C-369/20 *Landespolizeidirektion Steiermark* (C-368/20), *Bezirkshauptmannschaft Leibnitz* (C-369/20), 26 April 2022.

72 Schacht, 2022.

73 Zaiotti, 2011, p. 556.

74 Rumford, 2006, p. 133.

75 Rumford, 2006, p. 138.

76 European Commission, 2021, p. 5.

announced the establishment of a dedicated Schengen Forum to stimulate more concrete cooperation and re-build trust between all relevant stakeholders of the Schengen area.⁷⁷ The revision of the SBC will particularly consider the lessons learnt from the lack of sufficient support among Member States for the 2017 proposal.⁷⁸ The Commission detected two main problems in the Schengen area: (1) border checks at internal borders that are long-lasting and applied against an abstract threat or used as a first aid measure and (2) discrepancies in the application of the measures at the external borders.⁷⁹ The Commission feels that Member States utilise insufficient compensatory measures for the absence of border controls at internal borders, especially when new measures other than border checks are available.⁸⁰ Further, discrepancies in the application of travel restrictions at external borders undermine the trust and impact their credibility with third countries.⁸¹ Therefore, the Commission prepared its draft of amendments to the SBC in 2021. In it, the Commission stated that the EU may consider taking measures to address the problems identified, in accordance with the principle of subsidiarity, to reinforce the overall security and trust among Member States as prerequisites of the area without controls at internal borders, as well as ensure the ability of persons and goods to move freely across borders.⁸² The goal of this change in legislation is to ensure that persons and goods can move freely without unjustified or disproportionate hurdles within the Schengen area. The objectives to be achieved are the creation of a contingency plan for Schengen, application of mitigating measures and specific safeguards for cross-border regions, uniform application of measures at the external borders particularly in case of a threat to public health, increased use of compensatory measures to address the identified threats, and lifting of long-lasting border checks at internal borders.⁸³

⁷⁷ Ibid.

⁷⁸ The 2017 proposal aimed at extending the time limits applicable for the reintroduction of internal border controls in exchange for stronger procedural safeguards. It provided for an increase in the time limit for temporary reintroduction of border controls at internal borders in case of foreseeable threats to up to one year, with prolongation periods of up to six months. In contrast, a new consultation procedure was foreseen, in which the Commission would have the power to take a stance on the necessity and proportionality of the checks. European Commission, 2021, p. 6.

⁷⁹ European Commission, 2021, p. 8.

⁸⁰ The use of new technologies, police checks, cross-border police cooperation, and Advanced Passenger Information in the future can achieve the same objectives as the border checks put in place by Member States, while being more effective in this respect. European Commission, 2021, p. 18.

⁸¹ European Commission, 2021, p. 21.

⁸² European Commission, 2021, p. 33.

⁸³ European Commission, 2021, pp. 34–35.

The Commission opted for a targeted amendment of the SBC that would concern (1) developing a new procedure of “contingency planning for Schengen,” applicable in case of any serious threat to several or all Member States; (2) creating the possibility of adopting restrictions on non-essential travel into the EU for third country nationals in a situation of a serious threat, particularly to public health, at the external borders; (3) developing the concept of a “last resort measure” in the context of temporary reintroduction of border checks at internal borders in more detail compared to the current rules, which includes better clarifying which measures are considered as not equivalent to border checks and therefore admissible below the threshold of Art. 25 to 29 of the SBC and

The SBC would also be amended to establish a balance between the use of both border checks and compensatory measures at internal borders. To that end, the amendment should bring more clarity to the concept that border control at internal borders shall only be reintroduced as a “last resort measure.” In this context, intensification of police checks supported by new technologies would be explicitly mentioned as a necessary element of the risk assessment to demonstrate that border checks are indeed the last resort measure. Moreover, the catalogue of measures that can be used in the areas of internal borders without being considered as equivalent to border checks would be reviewed to address some recurring questions concerning police checks and reflect the upcoming developments, particularly regarding the use of Advanced Passenger Information.⁸⁴

5. Role of Frontex and Schengen

Frontex was founded based on Council Regulation (EC) 2007/2004 of 26 October 2004,⁸⁵ which led to the establishment of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. This regulation was repealed by Regulation (EU) 2016/1624 of 14 September 2016,⁸⁶ establishing Frontex, the European Border and Coast Guard Agency. Since its first intervention along the West African coast in 2006, the agency has fuelled and institutionally profited from the incessant depiction of migration movements towards Europe as crisis-inducing phenomena, and it has positioned itself as the central crisis response mechanism in Europe.⁸⁷ It has the task to efficiently manage the crossing of external borders. This includes addressing migratory

clarifying the conditions of using new technologies at internal borders and their vicinity; (4) limiting the side effects of any border checks by providing for the application of mitigating measures where appropriate as part of the obligation to ensure proportionality, particularly as concerns border regions; (5) introducing an obligation to prepare a risk assessment in case of reintroduction of border checks at internal borders; and (6) providing the Commission with better tools to be aware of the decision-making process in Member States and the actual use of reintroduced border checks (modified rules on notifications and reports on the reintroduction of border checks). European Commission, 2021, p. 40.

⁸⁴ European Commission, 2021, p. 42.

⁸⁵ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union; OJ L 349, 25. November 2004.

⁸⁶ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC; OJ, L 251, 16 September 2016.

⁸⁷ Perkowski, Stierl, and Burridge, 2023, p. 124.

challenges and potential future threats at those borders, thereby contributing to addressing serious crime with a cross-border dimension, and ensuring high-level internal security within the EU, while having full respect for fundamental rights and safeguarding the free movement of persons within the EU.⁸⁸ Its role changed dramatically after the migrant crisis in 2015. It can be said that the refugee crisis was a critical juncture in the evolution of Frontex. It allowed the Commission to propose more sovereignty-encroaching measures than ever before.⁸⁹

Frontex performs numerous duties set forth in Art. 8 of the Regulation on Frontex. Two new powers in the 2016 regulation are especially important. First, Frontex is granted a supervisory power it did not have before in the form of vulnerability assessments.⁹⁰ The agency now carries out a yearly assessment of each Member State's capacity and border vulnerabilities. This is 'a major innovation'.⁹¹ Second, a Member State's failure to comply with Frontex's vulnerability assessment recommendations may trigger an intervention by the agency. The so-called right to intervene⁹² gives Frontex the power to deploy border guards to a Member State if functioning of the Schengen area is threatened—subject to a Council decision.⁹³

6. Relation between the SBC and right of asylum

The SBC regulates border checks and, to a lesser extent, border surveillance along the EU's external borders. It lays down the entry conditions third-country nationals must satisfy to be allowed entry to the Schengen area.⁹⁴ The SBC provides for derogation from the entry conditions for three categories of persons.⁹⁵ One of these categories is third-country nationals whose entry may be authorised on humanitarian grounds or because of international obligations. Under Art. 14(1) of the SBC, a third-country national who does not satisfy the entry conditions under Art. 6(1) and does not belong to any category of persons referred to in Art. 6(5) should be refused entry into the territories of Member States. However, the refusal of entry should be without prejudice to the application of special provisions concerning the right of asylum and international protection. Further, Art. 4 provides that when applying the SBC, Member States should act in full compliance with relevant EU law, including the Charter of Fundamental Rights of the EU; relevant international

88 Art. 1 of the Regulation on Frontex.

89 Fjortoft, 2022, p. 564.

90 Art. 13 of the Regulation on Frontex.

91 Fjortoft, 2022, p. 557.

92 Art. 19 of the Regulation on Frontex.

93 Ibid.

94 Art. 6(1) of the SBC.

95 Art. 6(5) of the SBC. See European Council on Refugees and Exiles, 2021, p. 14.

law, including the Convention Relating to the Status of Refugees; obligations related to access to international protection, particularly the principle of non-refoulement; and fundamental rights. Moreover, Art. 3(a) stresses that the SBC applies without prejudice to the rights of refugees and persons requesting international protection, particularly regarding non-refoulement. Hence, Member States cannot refuse entry to a person requesting international protection without assessing whether or not they are in need of protection.⁹⁶ To ensure this, the Eurodac⁹⁷ system is very important. This system was envisaged in the late 1990s, as the Commission started to prepare the “Eurodac” project, a European Union initiative to use biometrics (specifically finger printing) for controlling illegal immigration and border crossings by asylum seekers.⁹⁸ This system was somewhat controversial from the beginning, as some argued that the obligation to surrender one’s biometric data violates certain human rights.⁹⁹ Nevertheless, the Eurodac regulation¹⁰⁰ was adopted by the Council of the European Union in 2000 and came into force on 15 January 2003.¹⁰¹ Especially after the Syrian crisis, efficient border management through better use of information technology (IT) systems and technologies was a top policy priority for the Commission at this stage. By making full use of these systems, the EU wanted to not only improve border management but also reduce irregular migration and return illegally staying third-country nationals.¹⁰² Of course, data must only be used

96 Ibid.

97 European Asylum Dactyloscopy Database

98 Van der Ploeg, 1999, p. 295.

99 Van der Ploeg, 1999, p. 301. Queiroz 2019, p. 159.

100 Now in force: Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast); OJ L 180, 29.6.2013.

101 The basic application is a combination of biometric identification technology and computerised data processing. The central unit, managed by the European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice, contains an automatic fingerprint identification system that receives data and replies “hit/no hit” to the Member State’s national authorities that are responsible for the quality of data and security of its transmission. The database contains information on three categories of persons who (1) seek asylum, (2) cross borders irregularly, or (3) are found to stay “illegally” within the EU territory. Collectable data include fingerprints of all persons aged 14 years and above, dates of collection, sex, place and date of the application for asylum or of apprehension, reference number, date of transmission to the Central Unit, and user identification of the person who transmitted the data. Data on asylum seekers are compared against data in the database and stored for 10 years. Data on irregular border crossers are stored for 18 months. Fingerprints of the third category of individuals are checked against previous asylum applications but are not stored. Bredström, Krifors, and Mešić, 2022, p. 69.

102 Queiroz, 2019, p. 158.

for legitimate purposes, equivalent to a ‘ban on aimless data collection’.¹⁰³ Additionally, these legitimate purposes must be specified before collection, and use or disclosure of the data must be compatible with the specified purposes. Finally, the principle of purpose limitation entails that data should not be retained for any period longer than necessary with regard to the purpose for which they were collected and stored.¹⁰⁴ As some authors say, it is clear that the EU’s migration policy is far from achieving its pivotal objectives demonstrated in the European Agenda on Migration: (1) reduction in the incentives for irregular migration, (2) border management for saving lives and securing the external border, (3) Europe’s duty to protect with a strong common asylum policy, and (4) a new policy on legal migration.¹⁰⁵ On the one hand, asymmetric integration of the asylum policy led to complete “Europeanisation” of Schengen rules on the elimination of physical controls at internal borders, while on the other hand, a “substantive” asylum policy remains firmly in the Member States’ hands. Therefore, some authors believe that it is a flawed structural setting that enables Member States to ‘compete as to how to most effectively divert the burden of migrants onto other states and free ride on their efforts’.¹⁰⁶ Accordingly, they call for a transfer of competences from the Member States to the EU and the establishment of a centralised EU institution governing the Common European Asylum System. Of course, this idea would be, in the present circumstances, very difficult to achieve. However, it is obvious that changes are needed to ensure the survival of the Schengen area, which is endangered because of many “temporary” border controls on the inner borders. Another issue is the problem tied to the strengthening of external borders and reintroduction of inner border controls—the protection of individual human rights of immigrants. Namely, all immigrants have the right to life and human dignity; they cannot be arbitrarily detained; they have the right of asylum and the right to private and family life; and the principle of non-refoulement must be observed. Immigrants also have the right to enter or leave the Schengen area when they meet the prescribed conditions.¹⁰⁷ Especially, observance of the non-refoulement principle and the possibility to ask for asylum are important when considering strengthening border controls. This is because this obligation may be triggered when national border guards try to prevent migrants from reaching the territory of a state—sometimes by returning them to their point of departure.¹⁰⁸

103 Queiroz, 2019, p. 163.

104 Ibid.

105 Nikolić and Pevcin, 2021, p. 251.

106 Ibid.

107 See Wouters and Ovadek, 2021, pp. 465–481.

108 Wouters and Ovadek, 2021, p. 477.

7. Conclusion

Schengen evolved from a ‘coordinated solo effort’ by France and Germany in 1984.¹⁰⁹ By 2005, it evolved, as mentioned above, into an institute to epitomise ‘freedom, security, and European success’¹¹⁰. It was almost taken for granted that free movement and “Europe without borders” will be a lasting success. However, the change in migration influx into the EU showed, as early as 2011, that Schengen area is highly vulnerable and that the joint trust among Member States is very fragile. This is also why the Schengen Member States kept a firm grip on issues of border controls and national security, which touch upon the very core of national sovereignty.¹¹¹ This can be vividly seen through the mechanism of reoccurring reestablishment of border controls at inner borders. This phenomenon is obviously the reaction of Member States to the problems occurring at the external border, which is, in their opinion, not performing its function. Of course, one should not neglect the political aspect of tensions between Member States regarding the path EU is (or should be) following. However, it must be said that the abolition of controls at internal borders does not mean that the EU, as a legal space, constitutes an abstract and borderless space that, in contrast with Member States’ legal orders, is not based on territory.¹¹² Quite the contrary: The abolition of internal border controls goes hand in hand with the establishment and fortification of a common external border and, thus, constitutes a common bounded space that is more than the mere sum of Member States’ territories. The abolition of internal border controls thus constitutes an essential element of the EU’s territorial claim and EU law’s territorial grounding.¹¹³ This, of course, means that the external border must provide sufficient security so the Member States do not feel that their national security is endangered by the lack of border controls on the inner borders. The objective of safeguarding national security was interpreted by the CJEU in 2020 in *Quadrature du Net*.¹¹⁴ The court said that Art. 4(2) of the Treaty on European Union provides that national security remains the sole responsibility of each Member State. This responsibility corresponds to the primary interest in protecting the essential functions of the state and fundamental interests of the society; it also encompasses the prevention and punishment of activities capable of seriously destabilising the fundamental constitutional, political, economic, or social structures of a country and particularly capable of directly threatening the society, population, or state itself, such as terrorist activities (para. 135). However, it is important to

109 Gülzau, 2023, p. 787.

110 Luc Frieden, then President of the EU Justice and Home Affairs Council, on when the celebration of the 20th anniversary of the signing of the Schengen agreements in Luxembourg. See in Zaiotti, 2011, pp. 537–538.

111 Gülzau, 2023, p. 788.

112 Salomon and Rijpma, 2023, p. 304.

113 Ibid.

114 Joined Cases C-511/18, C-512/18, and C-520/18, *La Quadrature du Net and Others v. Premier ministre and Others*, ECLI: EU:C:2020:791, Judgment of 6 October 2020.

highlight that any measure taken by a Member State must comply with the basic criteria set forth in Art. 52 of the EU Charter on Fundamental Rights (para. 136). From this we can see that it is impossible to separate the legal and political when talking about the function of Schengen and the implementation of SBC. Scholars focus on the dichotomy between states' selfish interests, which are represented by re-impositions of border control, and the EU approach and solidarity; however, the related legislation, practical initiatives, and political discourse demand a more nuanced analysis, since sovereignty is a very complex phenomenon that can be strengthened and restricted simultaneously.¹¹⁵ However, Schengen rules can be a tool for ensuring the rule of law while protecting the right of asylum in individual cases. It just needs to be fine-tuned, and Member States are responsible for its implementation in a proper manner. As Votoupalova suggested, the emphasis should not be on the dichotomy between selfish states and a common EU approach or between solidarity and national interests, as the two sides in both dichotomies are in reality compatible.¹¹⁶ However, as was said above, Schengen is based on the notion of mutual trust among Member States. Therefore, inner Member States must be able to trust that external Member States will adequately protect the external border. When and if this comes to pass, there will no longer be any reason (once again) to keep the now in place inner border controls. I believe that this is in the interest of all Member States.

¹¹⁵ Votoupalova, 2019, p. 90.

¹¹⁶ Votoupalova, 2019, p. 91.

References

- Bredström, A., Krifors, K., Mešić, N. (2022) 'Border Reconfiguration, Migration Governance, and Fundamental Rights: A Scoping Review of EURODAC as a Research Object', *Social Inclusion*, 10(3), pp. 68–81; <https://doi.org/10.17645/si.v10i3.5398>.
- Carrera, S., Colombi, D., Cortinovics, R. (2023) 'An Assessment of the State of the EU Schengen Area and its External Borders A Merited Trust Model to Uphold Schengen Legitimacy', *EU Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies*.
- Ceccorulli, M. (2019) 'Back to Schengen: the collective securitisation of the EU free-border area', *West European Politics*, 42(2), pp. 302–322; <https://doi.org/10.1080/01402382.2018.1510196>.
- Colombeau, S.C. (2020) 'Crisis of Schengen? The effect of two 'migrant crises' (2011 and 2015) on the free movement of people at an internal Schengen border', *Journal of Ethnic and Migration Studies*, 46(11), pp. 2258–2274; <https://doi.org/10.1080/1369183X.2019.1596787>.
- Cornelisse, G. (2019) 'What's Wrong with Schengen? Border Disputes and the Nature of Integration in the Area Without Internal Borders', *Common Market Law Review*, 51, pp. 741–770; <https://doi.org/10.54648/COLA2014060>.
- De Capitani, E. (2014) 'The Schengen system after Lisbon: from cooperation to integration', *ERA Forum*, 15, pp. 101–118; <https://doi.org/10.1007/s12027-014-0344-1>.
- Eurobarometer survey 'Integration of Immigrants in the European Union', June 2022. [Online]. Available at: <https://europa.eu/eurobarometer/surveys/detail/2276> (Accessed: 27 May 2024).
- European Commission (2013) *Third Biannual Report on the Functioning of the Schengen Area*, Brussels, 31 May 2013. [Online] Available at: https://home-affairs.ec.europa.eu/system/files/2020-09/third_biannual_report_on_the_functioning_of_the_schengen_area_en.pdf. (Accessed: 27 May 2024).
- European Commission (2015) *Managing the Refugee Crisis: Immediate Operational, Budgetary and Legal Measures, under the European Agenda on Migration*, Brussels, 23 September 2015. [Online] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0490>. (Accessed: 27 May 2024).
- European Commission (2018) *Migration and Home Affairs: Border Crossing* [Online] Available at: https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/border-crossing_en (Accessed: 27 May 2024).
- Fjørtoft, T. N. (2022) 'More power, more control: The legitimizing role of expertise in Frontex after the refugee crisis', *Regulation and Governance*, 16, pp. 557–571. <https://doi.org/10.1111/rego.12373>.
- Gülzau, F. (2023) 'A "New Normal" for the Schengen Area. When, Where and Why Member States Reintroduce Temporary Border Controls?', *Journal of borderlands studies*, 38(5), pp. 785–803. <https://doi.org/10.1080/08865655.2021.1996260>.
- Huybreghts, G. (2015) 'The Schengen Convention and the Schengen acquis: 25 years of evolution', *ERA Forum*, 16, pp. 379–426. <https://doi.org/10.1007/s12027-015-0402-3>.
- Karstens, F. (2020) 'How public discourse affects attitudes towards Freedom of Movement and Schengen', *European Union Politics*, 21(1), pp. 43–63. <https://doi.org/10.1177/1465116519874880>.
- Nikolić, B. and Pevcin, P. (2022) 'How to improve sustainability of the Schengen agreement on open borders?', *International Migration*, 60, pp. 244–257. <https://doi.org/10.1111/imig.12850>.

- Perkowski, N., Stierl, M and Burridge, A., 'The evolution of EUropean border governance through crisis: Frontex and the interplay of protracted and acute crisis narratives', *Environment and Planning D: Society and Space*, 41(1), pp. 110–129. <https://doi.org/10.1177/02637758231152478>.
- Queiroz, B.M. (2019) 'The Impact of EUODAC in EU Migration Law: The Era of Crimmi-gration', *Market and Competition Law Review*, 3(1), pp. 157-183. <https://doi.org/10.7559/mclawreview.2019.318>.
- Rumford, C. (2006) 'Rethinking European Spaces: Territory, Borders, Governance', *Comparative European Politics*, 4(2-3), pp. 127–140. <https://doi.org/10.1057/palgrave.ccp.6110089>.
- Salomon, S. and Rijpmma, J. (2023) 'A Europe Without Internal Frontiers: Challenging the Re-introduction of Border Controls in the Schengen Area in the Light of Union Citizenship', *German Law Journal*, 24, pp. 281-209; <https://doi.org/10.1017/glj.2021.60>.
- Schacht, K. (2022) 'Schengen states extend border checks, ignoring EU court', *DW*, 17 November 2022. [Online] Available at: <https://www.dw.com/en/schengen-states-extend-border-checks-ignoring-eu-court/a-63747406> (Accessed: 27 May 2024).
- Skaro, K. (2023) Slovenski ministar jucer: 'Schengen ne funkcionira' Grlic Radman danas: 'Ovo nije suspenzija Schengena', *Telegram*, 20 October 2023. [Online] Available at: <https://www.telegram.hr/politika-kriminal/slovenski-ministar-jucer-schengen-ne-funkcionira-grlic-radman-danas-ovo-nije-suspenzija-schengena/> (Accessed: 12 November 2023).
- Van der Ploeg, I. (1999) 'The illegal body: 'Eurodac' and the politics of biometric identification' *Ethics and Information Technology*, 1, pp. 295–302. <https://doi.org/10.1023/A:1010064613240>.
- Votoupalova, M. (2019) 'The Wrong Critiques: Why Internal Border Controls Don't Mean the End of Schengen', *New Perspectives*, 27(1), pp. 73–99. <https://doi.org/10.1177/2336825X1902700104>.
- Wang, S. (2016) 'An Imperfect Integration: Has Schengen Alienated Europe?', *Chinese Political Sciences Review*, 2016/1, pp. 698–719; <https://doi.org/10.1007/s41111-016-0040-0>.
- Wouters, J. and Ovadek, M. (2021) *The European Union and Human Rights*, Oxford: Oxford University Press. <https://doi.org/10.1093/oso/9780198814177.001.0001>.
- Zaiotti, R. (2011) 'Performing Schengen: myths, rituals and the making of European territoriality beyond Europe', *Review of International Studies*, 37, pp. 537–556. <https://doi.org/10.1017/S026021051000032X>.
- Zaiotti, R. (2013) 'The Italo-French Row Over Schengen, Critical Junctures, and the Future of Europe's Border Regime', *Journal of Borderlands Studies*, 28(3), pp. 337–354. <https://doi.org/10.1080/08865655.2013.862912>.
- Council Decision of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis, OJ L 176, 10 July 1999.
- Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25. November 2004.
- European Commission (2021) 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders', Strasbourg, 14 December 2021. [Online] Available at: <https://www.statewatch.org/media/3015/eu-com-schengen-borders-proposals-sbc-amendments-ia-swd-2021-462.pdf>. (Accessed: 27 May 2024).

- European Commission (2022) ‘Communication From the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions -- State of Schengen Report’, Brussels, 24 May 2022. [Online] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0301> (Accessed: 27 May 2024).
- Protocol No. 2 annexed to the Treaty of Amsterdam, Protocol Integrating the Schengen acquis Into the framework of the European Union, Art. 2, 1997 O.J. (C 340) 93.
- 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) (codification), OJ L 77, 23.3.2016.
- Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ, L 251, 16 September 2016.
- Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L 180, 29.6.2013.
- C-85/96, *María Martínez Sala v. Freistaat Bayern*, 1998 E.C.R. I-02691.
- Joined cases C-412/17 and C-474/17, *Bundesrepublik Deutschland v. Touring Tours und Travel GmbH and Sociedad de Transportes SA*, ECLI:EU:C:2018:1005, Judgment of 13 Dec. 2018.
- Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others v. Premier ministre and Others*, ECLI: EU:C:2020:791, Judgment of 6 Oct. 2020.
- Wijsenbeek, Case C-378/97 of 21 September 1999.

Annex 1
Notifications of the Temporary Reintroduction of Border Control¹¹⁷

Current Temporarily Reintroduced Border Controls

Austria	03/11/2023 – 22/11/2023	High migratory pressure and increase in apprehensions in the Western Balkans, extensive secondary migration, pressure on the asylum reception system, threat of human smuggling; border with Slovakia
Slovakia	04/11/2023 – 23/11/2023	Intensified migration pressure along the Balkan route, serious threat to the internal security and public order, high rate of illegal migration; internal border with Hungary.
Czechia	03/11/2023 – 22/11/2023	Significant increase in illegal secondary migration; increase in activity of organised groups of smugglers; deterioration of the migration and security situation at the EU's external borders; internal borders with Slovakia.
Poland	03/11/2023 – 22/11/2023	Intensified migration pressure along the Balkan route; border with Slovakia.
Italy	31/10/2023 – 19/11/2023	Raise of the threat of violence within the EU following the attack on Israel, risk of possible terrorist infiltration, constant migratory pressure by sea and by land, increase in the Central Mediterranean migratory flow; land border with Slovenia.
Slovenia	31/10/2023 – 19/11/2023	Threats to public order and internal security in the EU, the situation in the Middle East and in Ukraine, recent terrorist attacks in some Member States, increased security risks due to organised crime in the Western Balkans and violent extremism, risk of infiltration in mixed migration flows; internal borders with the Republic of Croatia and Hungary.
Austria	28/10/2023 – 16/11/2023	High migratory pressure, extensive secondary migration, increase in trafficking along the illegal migration routes; border with Czechia.
Germany	26/10/2023 – 14/11/2023	Migratory situation via the Eastern Mediterranean route, the Balkan region and through the Eastern route, increase in human smuggling; land borders with Poland, Czechia and Switzerland.

¹¹⁷ https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en State of affairs on 8 November 2023.

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Denmark	12/11/2023 – 11/05/2024	Significant threat to public policy and internal security by terrorists and organized crime, threat of espionage from foreign state intelligence, uncertainty in Europe due to the Russian invasion of Ukraine, increase in irregular migration; may extend to all internal borders (land, sea and air), with a focus on the Danish-German land border and Danish ports with ferry connection to Germany.
Norway	12/11/2023 – 11/05/2024	Threat to critical on-shore and off-shore infrastructures, foreign intelligence services threat in Norway; ports with ferry connections to the Schengen area.
Germany	12/11/2023 – 11/05/2024	Increase in irregular migration, Russia's war of aggression against Ukraine, the security situation exacerbated by terrorist groups in the Middle East, strain on the asylum reception system, increase in human smuggling; the land border with Austria.
Austria	12/11/2023 – 11/05/2024	Pressure on the asylum reception system, high migratory pressure at the EU's external border to Türkiye and the Western Balkans, threat of arms trafficking and criminal networks due to the war in Ukraine, human smuggling; borders with Slovenia and Hungary.
Sweden	12/11/2023 – 11/05/2024	Islamist terrorist threat, recent threats by terrorist organisations, statements by state actors, serious threat to public policy and internal security; all internal borders (exact borders to be determined).
France	01/11/2023 – 30/04/2024	New terrorist threats and external borders situation; internal borders.
Austria	12/05/2023 – 11/11/2023	Pressure on the asylum reception system, high migratory pressure at the EU's external border to Türkiye and the Western Balkans, threat of arms trafficking and criminal networks due to the war in Ukraine, human smuggling; land borders with Hungary and Slovenia
Sweden	12/05/2023 – 11/11/2023	Islamist terrorist threat; all internal borders (exact borders to be determined)
Germany	12/05/2023 – 11/11/2023	Increase in irregular migration from Türkiye through the Western Balkans, strain on the asylum reception system, human smuggling; the land border with Austria

Denmark	12/05/2023 – 11/11/2023	Islamist terrorist threat, organised crime, smuggling, Russian invasion of Ukraine, irregular migration along the Central Mediterranean route; land border with Germany and ports with ferry connections to Germany (during 3/08/2023-22/08/2023, at all internal borders)
Norway	12/05/2023 – 11/11/2023	Threat to critical on-shore and off-shore infrastructures, Russian intelligence threat in Norway; ports with ferry connections to the Schengen area