Schengen, Free Movement and Crises: Links, Effects and Challenges

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1 Schengen and Crises

This special issue builds on a seminar organised by the Centre for Migration Law (Radboud University, the Netherlands) on 4 November 2020 that set out to reflect on the relationship between Schengen and its free movement regime in the context of two crises: firstly, the so-called 2015 migration crisis that led to the reintroduction of internal border controls to deal with pressures at the external borders of the EU and secondary movements, and secondly, the 2020 COVID-19 crisis that prompted the majority of Schengen states to reintroduce internal border controls as part of their efforts to prevent the spread of the virus. Although ‘crisis’ and ‘reform’ are routinely associated with the Schengen system,¹ its resilience stands out, too. Rather than seeing crises as leading to the demise of the Schengen system, they seem to function more as productive moments leading to new forms of governance and new practices.² The articles of this special issue reflect on how Schengen’s crises have reshaped some of its founding principles, its operation and governance, while paying particular attention to the position of individuals and their rights.

The reintroduction of internal border controls in the Schengen area is neither novel nor exceptional, but the scale upon which this has happened in the context of the Corona pandemic is new. According to a recent European Parliamentary Research Service briefing on the Schengen Borders Code (SBC), compared to the period 2006–2014, when internal border controls were

1 Marie de Somer, ‘Schengen: Quo Vadis?’, (2020) 22 European Journal of Migration and Law 178.

2 Nicolas Jabko and Meghan Luhman, ‘Reconfiguring sovereignty: crisis, politicization, and European integration’, (2019) 26(7) Journal of European Public Policy 1037.

reintroduced 35 times, between 2015 and 2020, such checks were reintroduced 205 times.³ That is the case notwithstanding the fact that according to the SBC checks at internal borders are abolished, and can only be reintroduced in exceptional situations, as measures of last resort. 2020 was by all means an exceptional year, marked by the COVID-19 pandemic and national efforts to prevent the spread of the virus. As a result, the first part of 2020, which coincided with the first COVID-19 wave, was marked by the absence of free movement across internal EU borders coupled with the imposition of an EU 'travel ban' at the EU external border. As the second and third Corona waves hit Europe in 2020 and 2021, measures affecting intra-Schengen free movement endured, with some EU states continuing to favour the reintroduction of internal border checks despite growing evidence of their inefficiency in countering the spread of the virus and Commission guidance advocating for less restrictive measures (see Guild and Montaldo in this issue).

It is by now clear that the reintroduction of internal border controls comes with financial costs. Indeed, the financial arguments in favour of borderless travel in the Schengen area had already been laid out prior to the pandemic due to the estimated costs of 'non-Europe' for the internal market.⁴ If anything, the experiences of 2020 reinforced them, and as discussed by Guild in this issue, prompted a fiercer response in favour of Schengen and free movement from the European Commission. The Commission's communication from May 2020⁵ setting out a roadmap for the lifting of restrictions to free movement stresses several times the importance of free movement and lack of internal borders for the whole EU project and presents them as one of the main achievements of the EU. Clearly, the European Commission fears that 'non-Europe' and the abandonment of borderless travel as an organizing principle of the Schengen area may have legitimacy and image costs and dent citizens' positive image of the EU. Despite EU efforts to coordinate national responses to the pandemic and push for common action, on the ground, the reality has remained somewhat different. As discussed by Guild and Montaldo, several Member States have never lifted the restrictions and internal controls

3 Hannah Ahamad Madatali, 'Schengen Borders Code. Revision of Regulation (EU) 2016/399', (PE 662.662 – March 2021) 2.

4 Jorrit Rijpma, 'Covid-19, another blow to Schengen?', (2020) 27(5) Maastricht Journal of European and Comparative Law 545; European Parliamentary Research Service, 'Europe's two trillion dividend. Mapping the cost of Non-Europe 2019–2024' (PE 631.745 – April 2019) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631745/EPRS_STU\(2019\)631745_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631745/EPRS_STU(2019)631745_EN.pdf)> accessed 21 October 2021.

5 Commission, 'Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls – COVID-19' [2020] OJ C 169.

installed since 2015, preferring instead to switch from one legal basis to another to justify their maintenance.

In the first article of this special issue, Elspeth Guild identifies three overlapping regimes of temporarily reintroduced border controls in the Schengen area based on their declared justifications: to counter terrorism, the secondary movement of persons seeking protection within the Schengen area, and the spread of COVID-19. Guild's analysis shows that these regimes have elicited different responses from the EU institutions (in particular, the EU Commission and Council). Essentially, the reintroduction of intra-Schengen border controls to counter terrorism and prevent the secondary movement of asylum seekers led to substantial focus being placed on EU external border controls and the enhanced role of Frontex, the EU's external border agency, in stopping unwanted persons, be they terrorists, criminals or asylum seekers, from entering Europe. According to Guild, the success of this Commission-led campaign to frame the first two issues as EU external border issues has been partial. The Commission has started to advocate the use of police checks in border areas as an alternative to controls related to migration and security, while those EU states that reinstated internal border controls continue to maintain them. Contrary to the first two regimes, the reintroduction of internal border controls to counter the COVID-19 virus has put the very essence of the EU at risk, namely the internal market. This explains why the institutions went as far as appropriating legislative powers to further a re-opening of the area by introducing the 'EU Digital COVID Certificate' Regulation. Guild opines that none of the above responses are particularly well equipped to answer the fundamental question of what is the role of intra-Schengen controls.

The article by Stefano Montaldo dives deeper into the reintroduction of internal Schengen border controls on public health grounds. The article focuses on the legal implications of the border measures adopted by the Member States following the COVID-19 outbreak and their compatibility with EU law in light of epidemiological studies that qualify the link between border control and the spread of the virus. Concerning the reintroduction of border controls at internal Schengen borders, Montaldo argues that it is difficult to challenge the position of national authorities in the first stages of the pandemic when information on the new virus was limited. However, after the first COVID-19 wave, the burden of proof as to the suitability, necessity and proportionality of reintroduced border control evolves, especially as newly acquired scientific evidence does not support the suitability of border controls in countering the spread of the virus. Rather, epidemiological evidence speaks in favour of health checks and health prevention measures as less restrictive and more effective measures. Such measures can include the obligation to quarantine, being in

possession of a vaccination certificate or negative test prior to departure, filling in a passenger locator form etc. Building on Member States' legally questionable practices and the Commission's inaction in challenging such practices, the article goes to discuss possible SBC reforms that would strengthen the governance of the Schengen area. Montaldo argues in favour of strengthening the role of technical bodies, such as the European Centre for Disease Prevention and Control (ECDC) in cases of crises that involve complex scientific issues coupled with the introduction in the SBC of a 'general systemic crises' clause. This new clause should be modelled on Article 29 SBC in order to establish an inter-institutional and multi-level procedure for the reinstatement of border controls as a counter-balance to Member States' instinctual resort to intergovernmentalism as the most appropriate response in case of crises.

2 Schengen and Technology

Calls for the reform of the SBC rules allowing for the reintroduction of temporary controls at internal borders are ongoing since 2015, but no agreement was reached on their renegotiation during the 2015–2020 legislature. However, during this period legislation was enacted that aims to reinforce the security of EU's external borders. This includes legislation enhancing the role of Frontex as EU's external border agency,⁶ the introduction of increased entry and exit checks on anyone crossing the external borders,⁷ and the reinforcement of systematic checks against relevant databases at the external borders on all persons, including those enjoying the right of free movement under EU law in response to the increase in security threats.⁸ These legislative developments serve as a reminder that borderless travel within Europe is closely linked to common rules on migration and asylum and the development of closer cooperation in criminal justice and police action.⁹ It is thus important to note that

6 Regulation (EU) 2019/1896 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295/1.

7 Regulation (EU) 2017/2226 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011 [2017] OJ L 327.

8 Regulation (EU) 2017/458 amending Regulation (EU) 2016/399 as regards the reinforcement of checks against relevant databases at external borders [2017] OJ L 74.

9 Jorrit Rijpma, 'Let's not forget about Schengen', (*EU Immigration and Asylum Law and Policy*, 12 March 2021) <<https://eumigrationlawblog.eu/lets-not-forget-about-schengen/>> accessed 21 October 2021.

concurrently to the hollowing out of the idea of borderless Europe through the reintroduction of internal border controls since 2015, the differences between the legal regimes applicable to EU citizens and TCNs have started to be erased by the extension of the categories of persons who should be systematically checked when crossing EU internal and external borders. Moreover, the deployment of new technologies and automated processing coupled with the shift towards 'datafication' and interoperability¹⁰ play an essential role in how the Schengen system and some of its founding principles are being transformed, while migration management and security are further fused together. The articles by Julien Jeandesboz, Niovi Vavoula and Evelien Brouwer explore different aspects of this technologically underpinned transformation and their implications for fundamental rights.

The article by Julien Jeandesboz questions one of the fundamental principles of the Schengen system – the idea of borderless travel within the Schengen area – in relation to PNR data, which are unverified information provided by passengers and collected by (air) carriers to enable the reservation and check-in processes. The EU PNR Directive provides for EU-wide rules organising the systematic transfer of PNR data and its processing, including exchange, by national authorities of the EU Member States and Europol for the purposes of preventing, detecting, investigating and prosecuting terrorist offences and serious crime. The questions raised by the article are whether PNR data processing is a 'border control' in the definition of the SBC and how to understand the harnessing of 'new technology' to enact systematic controls on persons traveling across the internal borders of Schengen states. Jeandesboz argues that amongst the alternatives to border checks available for Member States to regulate cross-border mobility in the Schengen area, PNR data processing stands out because it involves the systematic screening of *all* travelers relying on commercial transportation services in the context of intra-Schengen mobility. Therefore, it challenges the existing legal framework of the SBC and the assessment framework developed by the CJEU in its relevant case-law, not because it contravenes Schengen rules, but because it stretches and overflows them. According to Jeandesboz, PNR data processing fundamentally alters what borderless travel actually means in practice because it is increasingly conditioned upon the systematic screening and surveillance, without any grounds related to their actual behaviour, of all persons relying on commercial transportation services when traveling across borders in the Schengen area.

10 Didier Bigo, 'Interoperability: A political technology for the datafication of the field of EU internal security', in Didier Bigo and others (eds) *The Routledge Handbook of Critical European Studies* (Routledge 2020).

Niovi Vavoula's article focuses on the EU's growing interest and investment in Artificial Intelligence (AI) as the future of migration management. Automated risk assessments and algorithmic profiling in the context of examining applications for travel authorisations (ETIAS) and Schengen visas (VIS) as well as the processing of facial images of TCNs in anticipation of the incorporation of facial recognition technology are assessed in light of EU fundamental rights, such as respect for private life, protection of personal data and non-discrimination. Vavoula is concerned that automated comparisons of data present in information systems and databases capitalise on data collection but could be based on unreliable information – poor quality of data are destined to produce equally poor outcomes. Notably, algorithmic profiling may reinforce existing restrictive policies, by transforming discriminatory practices in the decision making on travel authorisations and visas into discriminatory algorithms. The author argues that such techniques essentially take advantage of the weak position of TCNs at the borders, who will find it extremely hard to contest technological fixes. Facial recognition technology is considered equally problematic, with algorithmic bias on grounds of race and gender being a significant risk. The risk associated with the use of AI technology in border management lies in its potential for social sorting of foreigners depending on whether they originate from specific countries. To minimise such risks, Vavoula argues in favour of reinforcing effective remedies for TCNs, raising awareness about their existence, ensuring accountability, transparency, close monitoring in the development of algorithms and setting clear obligations on Member States to maintain high data quality in information systems.

The relationship between technology and access to legal remedies for TCNs is the focus of the article by Evelien Brouwer. The article discusses instruments of mutual exclusion as provided in the Schengen Information System (SIS), the exclusion of TCNs based on the consultation mechanism in the Visa Code, the use of ECRIS-TCN for immigration purposes¹¹ as well as future proposals. The later include the use of risk assessment and profiling in the pre-screening proposal introduced by the New Pact on Migration, the flagging of security risks and the proposed use of lie detectors in the European Commission's Artificial Intelligence proposal. Based on the CJEU's jurisprudence, the article examines the minimum standards for the right to effective

11 ECRIS stands for the European Criminal Records Information System and allows for an electronic exchange of criminal record information between Member States. The system allows national criminal authorities to obtain complete information on previous convictions of EU nationals. ECRIS-TCN will allow national authorities to identify which other Member States hold criminal records on the TCNs or stateless persons being checked.

remedies for TCNs reported, flagged, or simply considered as unwanted by Schengen states. Similar to Vavoula, Brouwer's analysis shows that the individual rights of migrants are insufficiently protected from the exclusionary and discriminatory effects of the new technologies relied upon in immigration control and management. Brouwer argues that notwithstanding the important role of courts, the legislator should remedy existing deficiencies concerning the right to an effective remedy and provide for a right for individuals who have been denied entry, a visa, or travel authorisation for the Schengen area to be informed about which record in which information system exists, and subsequently resulted in a refusal. The same holds for decisions based on the objection from another state and exclusion based on risk assessment or a 'security flag'. Lastly, Brouwer makes a clear case against the use of any form of lie detectors within the framework of asylum and immigration decision-making.

3 Fundamental Rights: Schengen's Nemesis?

In June 2021, the European Commission published a communication titled 'A strategy towards a fully functioning and resilient Schengen area',¹² in which it reiterated the need to restore the Schengen area as an area without internal controls. Yet again, the emphasis was laid on the need to improve the management of external borders in order to compensate for the absence of internal border controls coupled with the strengthening of internal (flanking) measures on police cooperation, security and migration management and robust crisis preparedness and governance. Among the announced measures were the revision of the SBC and of the Schengen Evaluation and Monitoring Mechanism (SEMM) which is designed to assess the way in which Member States apply the Schengen acquis. The Commission's strategy for the Schengen area was published while Frontex, the agency responsible for the EU's external border, was mired in controversy concerning allegations of human rights violations by the agency regarding alleged push-backs of potential refugees away from Greek islands and back into Turkish waters, suggesting a fraught relationship between Schengen's governance and respect for fundamental rights.

The final article of this special issue focuses precisely on the role of fundamental rights within the Schengen system. Citing evidence of EU states involved in migrant push-backs and attempts to build fences to prevent migrants from entering their territories, Tineke Strik argues that policies and practices of

¹² Commission, 'A strategy towards a fully functioning and resilient Schengen area', COM/2021/277 final.

border control tend to prioritise the prevention of irregular migration at the cost of respect for fundamental rights. At the same time, the Schengen system does not provide for a corrective mechanism to balance these two interests as shown by the lack of criteria on compliance with and enforcement of fundamental rights in the Schengen Evaluation and Monitoring Mechanism, and the fact that in a number of Member States there are no effective monitoring mechanisms or procedures to investigate complaints. Strik is equally critical of the Commission's inaction to combat violations and end Member State impunity since such inaction exacerbates the vulnerability of asylum seekers. Moreover, the author argues that the proposals in the draft Screening Regulation that put forward as solution new monitoring mechanisms may turn out ineffective. In the author's view, the biggest obstacle to ensuring that the fundamental rights of TCNs are protected and respected is the lack of political will at the national and EU levels to acknowledge and combat fundamental rights violations.

The resilience of the Schengen system is linked to its capacity to absorb and convert different types of risks into new forms of governance. As shown by the articles of this special issue, in this process some of Schengen's foundational principles are reconfigured, if not in law, at least in practice and with worrying effects for the fundamental rights of mobile individuals, citizens and migrants alike. The tendency to slide back into intergovernmentalism, the overreliance on technological fixes and fundamental rights compliance remain issues in need of urgent attention during the overhaul of the Schengen system announced by the European Commission.

Acknowledgements

This special issue is realised with the support of the Erasmus+ Programme of the European Union as part of 'CIMIS: Citizenship, Migration and security', the CMR's Jean Monnet Centre of Excellence Work Program 2018–2021, contract number 599736-EPP-1-2018-1-NL-EPPJMO-COE. The European Commission's support for the production of this publication does not constitute an endorsement of the contents, which reflect the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

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15 October 2021