Schengen Borders and Multiple National States of Emergency: From Refugees to Terrorism to COVID-19

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Abstract

The re-introduction of intra-Schengen state border controls has been a constant feature of the area since the abolition of those controls in 1995. The seriousness of the controls introduced and the justifications which have been put forward for them have varied substantially. At the moment there are three overlapping regimes of temporarily reintroduced border controls in the area: those reintroduced to counter terrorism, those reintroduced to counter so-called secondary movements (the movement of people seeking international protection within the Schengen area) and those introduced to counter the spread of COVID-19. The article examines the three frameworks of temporary controls, the justifications provided by states using them for their operation, and the response of the EU institutions.

Keywords

migrants – asylum seekers – terrorism – intergovernmentalism – derogations

1 Introduction

The Schengen area consists of 26 European states, most members of the EU¹ but some not.² In law, it consists of two main features: the absence of intra-Schengen state border controls on persons and a common external border control on entry into the Schengen area. These two features are constructed as flanking the main objective which is the abolition of intra-Schengen state controls on movement of persons and which is central to the completion of the internal market, the EU's *raison d'être*. The intersection of internal and external border controls is presented as necessary, the later required to achieve the former. In this paper, I will examine the challenges to the logic, law and operation of the Schengen system over the period 2015–2021 which have been triggered by a sequence of three events. First, there was the arrival of more refugees than expected in the period 2015–2016; secondly, a series of terrorist attacks in a number of EU countries (most prominently France) in 2015–2016 responsibility for which was claimed by Al Qaeda or related religious bodies, and thirdly, in 2020–2021 efforts to use border controls to contain the COVID-19 pandemic. The first of these challenges has led to substantial focus on external border controls, including the enhancement of the EU external border agency, Frontex.³ The second has led towards greater coordination in respect of anti- and counter-terrorism measures, with a focus in particular on the EU's external borders.⁴ Finally, the third has put into disarray the internal border control free system of Schengen, but with less focus on the external border and its control.⁵ The resilience of the Schengen system, however, has been impressive. Notwithstanding the challenges, as the European Commission notes in its Communication of June 2021,⁶ it is 'one of the biggest achievements of

1 The EU states which are not part of the Schengen system are: Bulgaria, Croatia, Cyprus, Ireland and Romania. The only one which is voluntarily not part of the system is Ireland, the others are all awaiting approval of their applications for membership.

2 The non-EU Schengen states are: Iceland, Liechtenstein, Norway and Switzerland.

3 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 PE/33/2019/REV/1 [2009] OJ L295.

4 Elspeth Guild, 'Counter-Terrorism Resolutions and Initiatives by Regional Institutions: EU and European Court of Human Rights' in Eran Shor and Stephen Hoadley (eds), *International Human Rights and Counter-Terrorism* (Springer 2019).

5 Elspeth Guild, 'Covid-19 Using Border Controls to Fight a Pandemic? Reflections From the European Union' (2020) 2 *Frontiers in Human Dynamics* 13.

6 Communication from the Commission to the European Parliament and the Council 'A strategy towards a fully functioning and resilient Schengen area', COM/2021/277 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0277>> accessed 9 September 2021.

European integration' with an undisputed fundamental role in the EU's construction. While challenges (1) and (2) were transformed into external border control issues, the 3rd has put the internal market at risk.

2 Schengen and Border Controls

From the inception of the European Economic Community (now the EU),⁷ a central element of the common market (now the internal market) has been the free movement of goods, person, services and capital across the territories of the Member States. This objective has been re-enforced and enhanced continuously as the EU has extended its field of activities and competences⁸ and widened its membership from six states to twenty-eight, then reducing to twenty-seven with the departure of the UK.⁹ The big push for the completion of the internal market which resulted in the Single European Act 1987 (SEA), included the principle of the abolition of intra-EU controls on the free movement of goods, persons services and capital. However, the establishment of an objective to complete the internal market through the abolition of border controls by 31 December 1992 set out in the SEA had already been pre-empted by the construction of the Schengen system as an intergovernmental agreement among and (originally) limited to EU Member States through the Schengen Agreement 1985.¹⁰ In fact, it was opened to some neighbours, members of the European Economic Area (EEA). As a result of industrial action in the transport sector, in 1984 the leaders of France and Germany reached a political agreement to abolish border controls between them to resolve the problem of delays to the movement of goods at border control points.¹¹ The Benelux countries immediately sought to participate in the project leading to the first agreement, leaving only Italy as an original EU Member State outside the new regime. The intergovernmental approach of Schengen was strongly supported

7 Notwithstanding the changes in name to the organisation, I will refer to it here exclusively as the EU in the interests of clarity for the reader rather than strict accuracy for the expert.

8 Jürgen Bast, 'Deepening supranational integration: Interstate solidarity in EU migration law' in Andrea Biondi, Eglė Dagilytė and Esin Küçük (eds), *Solidarity in EU Law: Legal Principle in the Making* (Edward Elgar Publishing 2018).

9 Christophe Hillion, *EU enlargement: a legal approach* (Bloomsbury Publishing 2004); Federico Fabbrini, *The law & politics of Brexit* (Oxford University Press 2017).

10 European Union, 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, Schengen Agreement [1985] OJ L239 <<https://www.refworld.org/docid/3ddcb75a4.html>> accessed 18 August 2021.

11 Didier Bigo, *Polices en réseaux. L'expérience européenne* (Presses de Sciences Po 1996).

over time by other Schengen States leading to a tension between this approach and the SEA which planned the abolition of border controls as an EU competence. In any event, the fall of the Berlin Wall and the end of bipolarity in 1989 slowed down the process as the question of movement of persons moved up the political agenda with the removal of exit controls from the former Warsaw block countries and the reunification of Germany resulting in substantial movement of persons which needed to be accommodated.

Nonetheless, in the context of the intergovernmental project, first an implementing agreement was negotiated in 1990¹² and border controls on persons were actually abolished on 25 March 1995 among the initial Schengen states (with a delay in respect of France on account of Dutch policies on drugs). The whole system was incorporated in the EU legal order in 1999 through the Amsterdam Treaty¹³ which incorporated the whole Schengen acquis into EU law, specifically the (then) new Area of Freedom, Security and Justice.¹⁴ The Schengen system, notwithstanding its transformation into EU law, has never entirely lost its intergovernmental origins. The exceptions to the abolition of intra-Schengen State border controls being one of the clearest manifestations of this vestigial intergovernmentalism.

The re-introduction of intra-Schengen state border controls has been a constant feature of the area since the abolition of those controls in 1995. Mainly, these controls have been re-introduced for temporary purposes such as political or sporting events or in the event of sanitary issues.¹⁵ The importance of the controls re-introduced and the justifications which have been put forward for them have varied substantially. However, from 2015 the temporary nature of these re-introductions changed into a more durable regime, at least in the political rhetoric. By 2021, there are three overlapping regimes of temporarily reintroduced border controls in the area: those reintroduced to counter so-called

12 Convention Implementing the Schengen Agreement of 14 June 1985 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 ('Schengen Implementation Agreement, 19 June 1990' <<https://www.refworld.org/docid/3ae6b38a20.html>> accessed 18 August 2021.

13 Treaty of Amsterdam amending the Treaty on European Union, The Treaties Establishing the European Communities and certain related Acts [1997] OJ C340 <<https://www.refworld.org/docid/51c009ec4.html>> accessed 18 August 2021.

14 Pieter Jan Kuijper, 'Some legal problems associated with the communitarization of policy on visas, asylum and immigration under the Amsterdam Treaty and incorporation of the Schengen acquis' (2000) 37(2) Common Market Law Review 345.

15 Kees Groenendijk, 'New borders behind old ones: Post-Schengen controls behind the internal borders and inside the Netherlands and Germany' in Kees Groenendijk, Elspeth Guild and Paul Minderhoud (eds), *In Search of Europe's Borders* (Brill 2003).

secondary movements (the movement of people seeking international protection within the Schengen area), those reintroduced to counter terrorism, and those introduced to counter the spread of COVID-19. Each of these regimes has presented different issues for the EU and the system in general. The first issue which must be addressed is what are border controls a solution to – what was the question? In the first instance of 2015–16, in some Schengen States starting with Germany, it seems the question was too many refugees or insufficient reception capacity to house and accommodate them. In other Member States, starting with France, it was too many terrorists albeit that most attacks were carried out by French nationals. In other Schengen States, from March 2020 onwards, it has been too many sick people moving across the continent. In each case, the question might be asked: why are border controls on persons an appropriate response? But, in each case, the question of border controls, where, and on whom has been differently addressed politically and legally.

In the first instance, the justification for a derogation from the Schengen border control free area was dealt with by the EU as a matter of inadequacy of the Schengen external border control, particularly between Greece and Turkey. The solution (which has not led to a lifting of the temporary controls) was to remove Greece from the Schengen border control free system.¹⁶ In the second instance, the response to the terrorism threat prompted by France has been to strengthen EU action in the field of counter-terrorism but without extending the EU competences in the area.¹⁷ This has resulted in new databases around so-called foreign fighters (i.e., EU nationals who seek to re-enter the EU after spending time in countries where insurrections are occurring).¹⁸ Once again the focus has been on the control of the Schengen external border. Thus, the first two Schengen ‘crises’ were resolved by placing the problem at the external border, rightly or wrongly, rather than at the intra-Schengen borders. The fact that in neither instance were those Schengen States which were most concerned about the policy convinced to lift the re-introduced intra-Schengen border controls on persons indicates the success or failure of the EU efforts to move the problem to the external border. In the third instance, the COVID-19 threat, while the virus arrived in the EU from China (directly or indirectly) the

16 Salomi Boukala and Dimitra Dimitrakopoulou, ‘Absurdity and the “blame game” within the Schengen area: Analyzing Greek (social) media discourses on the refugee crisis’ (2018) 16(1–2) *Journal of Immigrant & Refugee Studies* 179.

17 Didier Bigo et al., *The EU and its counter-terrorism policies after the Paris attacks* (CEPS 2015); Javier Argomaniz, Oldrich Bures, and Christian Kaunert, *A decade of EU counter-terrorism and intelligence: A critical assessment* (Routledge 2015).

18 Christopher Baker-Beall, ‘The threat of the “returning foreign fighter”: The securitization of EU migration and border control policy’ (2019) 50(5) *Security Dialogue* 437.

measures adopted by Schengen States have been exceedingly heterogeneous and focused primarily on intra-EU border controls, with or without formal Schengen derogations. As the Commission's Communication of June 2021 indicates, it is no longer possible to place the Schengen derogations in the context of failures at the EU external border, the whole system is being put at risk by the pressures emanating from within the interior ministries of some Member States to re-invest state sovereignty in national border controls on the movement of persons.¹⁹

3 Schengen and the Movement of Refugees 2015–16

In August 2015, it was clear that the security situation of Syrian refugees in Turkey, a country which is providing reception to 3.6 million of them,²⁰ no longer enjoyed the confidence of these refugees who began to move in substantial numbers to the EU in search of greater security and life chances. This movement of persons continued for a couple of years, contributing to a rise in asylum applications to approximately 1 million persons per year for those two years, from over 600,000 applications in 2014. The highly mediated images of refugees walking across the Balkans²¹ towards northern Europe contributed to the decisions of the German and Austrian authorities (pushed by their Interior Ministries) to reintroduce intra-Schengen border controls between them on 13 September 2015. Notwithstanding preamble 26 of the Schengen Borders Code (SBC) which specifically prohibits such measures on grounds of movement of large numbers of third country nationals²² these two states began a minor, but significant politically, wave of intra-Schengen border closures on the basis of too many third country nationals arriving and the attempt to

19 See joint letter to the EU Vice-President 1 June 2021 from the ministers of the interior of Belgium, France, Germany, Luxembourg and Switzerland regarding so-called secondary movements of persons within the EU [on file with the author].

20 UNHCR, 'Refugees and Asylum Seekers in Turkey' <<https://www.unhcr.org/tr/en/refugees-and-asylum-seekers-in-turkey>> accessed 19 August 2021.

21 BBC, 'Migration to Europe in Charts' (11 September 2018) <<https://www.bbc.com/news/world-europe-44660699>> accessed 19 August 2021.

22 'Migration and the crossing of external borders by a large number of third-country nationals should not, per se, be considered to be a threat to public policy or internal security.' 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) [2016] OJ L 77.

stop them at the borders with another Schengen state.²³ A number of other Schengen states joined in the border closure approach, including most of the Nordic states which had enjoyed border control free travel since the creation of the Nordic Passport Union in the 1950s.²⁴ The legal framework of the SBC regarding re-introduction of temporary border controls among Schengen states is beyond the scope of this article (being particularly intricate). Suffice it to say that the strict time limits and justifications for the adoption of these measures were more or less respected by the relevant states. But *in extremis* when all the different time limits had been exhausted, the use of the exceptional clause on serious deficiencies in the carrying out of external border control was deployed on the basis of the failure of Greece to prevent border crossings to justify temporary continuation of intra-Schengen controls on persons.²⁵

At first the European Commission sought to resolve the pressures among the Schengen state interior ministries surrounding the arrivals by proposing a temporary system of relocation of asylum seekers based on a distribution key.²⁶ These measures were hotly (but ultimately unsuccessfully) disputed by a number of Schengen states, including before the Court of Justice of the European Union (CJEU).²⁷ However, it was clear that even the so-called refugee or migration crisis of 2015–2016 was insufficient to convince the Schengen states to proceed towards a distribution of asylum seekers among themselves on the basis of an agreed key of factors. Instead, the tired and rather ineffective Dublin III system of distribution of asylum seekers continued to be the only basis for transfers of asylum seekers which in practice rarely occurred.²⁸

As an alternative approach, the Commission followed the preference of some Schengen state interior ministries and turned the issue of reception of asylum seekers and the determination of their claims into one of external relations. The first step in this direction was the negotiation of the EU Turkey Statement in 2016, whereby the Turkish Government agreed to prevent

23 Elspeth Guild et al., 'Enhancing the Common European Asylum System and alternatives to Dublin', Study for the LIBE Committee (European Parliament 2015).

24 Miika Tervonen, 'The Nordic passport union and its discontents: Unintended consequences of free movement' in Johan Strang (ed) *Nordic Cooperation. A European Region in Transition* (Routledge, 2015); Elspeth Guild et al., 'What is happening to the Schengen Borders?' (2015) CEPS Paper in liberty and security in Europe 86.

25 Michela Ceccorulli, 'Back to Schengen: the collective securitisation of the EU free-border area' (2019) 42(2) *West European Politics* 302.

26 Natascha Zaun, 'States as Gatekeepers in EU Asylum politics: Explaining the non-adoption of a refugee quota system' (2018) 56(1) *Journal of Common Market Studies* 44.

27 Case C-715/17 *Commission v Poland & Ors*, EU:C:2020:257.

28 Francesco Maiani, 'The Reform of the Dublin III Regulation', Study for the LIBE Committee (European Parliament 2016).

the departure of people from its shores towards the EU (mainly Greece) in return for substantial aid from the EU Member States and the promise of visa free travel for Turkish nationals to the EU.²⁹ The Statement was challenged before the CJEU which, to the surprise of many, held that it was an agreement among the Member States, outside the scope of EU law.³⁰

The process generally known as externalisation of migration and border control was not new in 2016.³¹ However, the use by the EU collectively of arrangements with third countries to prevent migration towards the EU (including of asylum seekers) was. While a number of Schengen states had long standing arrangements with third countries in this regard, such as Italy with Libya³² or the Spanish arrangements with Morocco,³³ the embrace of this policy by the EU as a whole and positioning it as a central plank of its integrated border policy was new.³⁴ One of the consequences of this externalisation of border control through arrangements with third countries was to conjure into existence migration diplomacy,³⁵ providing a new tool in international relations. By seeking to make responsible neighbouring non-Schengen countries for preventing asylum seekers (and others) from arriving in the EU, the EU placed itself in a highly vulnerable position in respect of those neighbours. While the Western Balkan states sought to comply faithfully with the EU objectives in hopes of accession to the EU,³⁶ other neighbouring states which have little

- 29 Bodo Weber, 'The EU-Turkey Refugee Deal and the not quite closed Balkan route' (Friedrich Ebert Stiftung 2017) 1–25.
- 30 Thomas Spijkerboer, 'Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice' (2018) 31(2) *Journal of Refugee Studies*.
- 31 Georgia Papagianni, 'Forging an external EU migration policy: from externalisation of border management to a comprehensive policy?' (2013) 15(3) *European Journal of Migration and Law* 283.
- 32 Anja Palm, 'The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?' (2017) *EU Immigration and Asylum Law and Policy Blog*.
- 33 Francisco Javier Donaire Villa, 'Morocco and Spain Bilateral Legal Relationship on Migration and Asylum Issues' in Markus Kotzur et al. (eds), *The External Dimension of EU Migration and Asylum Policies* (Nomos 2020).
- 34 Bruno Oliveira Martins and Michael Strange, 'Rethinking EU external migration policy: contestation and critique' (2019) 5(3) *Global Affairs* 195–202; Katharina Eisele, *The External Dimension of the EU's Migration Policy. Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Martinus Nijhoff Publishers 2014).
- 35 Fiona B. Adamson and Gerasimos Tsourapas 'Migration diplomacy in world politics' (2019) 20(2) *International Studies Perspectives* 113; Helene Thiollet 'Migration as diplomacy: Labor migrants, refugees, and Arab regional politics in the oil-rich countries' (2011) 79(1) *International Labor and Working-Class History* 103–121.
- 36 Neža Kogovšek Šalamon, 'Asylum systems in the Western Balkan countries: current issues' (2016) 54(6) *International Migration* 151; Jovana Arsenijević et al. 'A crisis of protection

realistic expectation of accession recognised this EU external relationship imperative as a new tool to enhance their bargaining position with the EU.³⁷ Consequently, the threat of lifting exit obstacles for asylum seekers (and others) trying to leave third countries in the direction of the EU has become a highly salient international relations issue.³⁸

In the context of this paper, the direction of policy travel towards formulating Schengen external border crossing as the source of political trouble to be resolved provided a new field of Commission activity to prove the need for EU coordination in the field of border control. However, it did not satisfy the Schengen states which had introduced temporary border controls within Schengen in 2015 that it was sufficient as they continued (and continue at the time of writing) to maintain these exceptional controls.³⁹

4 Schengen and Terrorism

France justified its reintroduction of border controls on the basis of its national state of emergency in January 2015 following a terrorist attack in Paris.⁴⁰ The EU responded rapidly with a European Agenda on Security in April 2015⁴¹ promising common high standards of border management and the introduction of Smart Borders primarily focused on the external border.⁴² The policy

and safe passage: violence experienced by migrants/refugees travelling along the Western Balkan corridor to Northern Europe' (2017) 11(1) Conflict and Health 1–9.

37 Giray Sadik and Hilal Zorba, 'Humanitarian diplomacy for Syrian refugees and Turkey-EU relations' (2017) 3(2) *Göç Araştırmaları Dergisi* 10–39; Kim Rygiel, Feyzi Baban and Suzan Ilcan, 'The Syrian refugee crisis: The EU-Turkey "deal" and temporary protection' (2016) 16(3) *Global Social Policy* 315–320.

38 For example the 2021 crisis between Belarus and Lithuania <<https://www.nytimes.com/2021/07/19/world/europe/lithuania-belarus-migrants-european-union.html>> accessed 20 August 2021.

39 European Commission, 'Temporary Reintroduction of Border Controls' <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en> accessed 8 October 2021. These states are: Austria, Denmark, France, Germany, Norway and Sweden.

40 Shawn J. McCoy, Ian K. McDonough, and Punarjit Roychowdhury, 'The impact of terrorism on social capital: evidence from the 2015 Charlie Hebdo Paris shooting' (2020) 82(3) *Oxford Bulletin of Economics and Statistics* 526.

41 COM(2015)185.

42 According to the European Commission, Smart Borders consist of '[...] several pieces of legislation, which regulate Schengen border crossings. In addition to these, the Entry/Exit System (EES) Regulation and the related amendment of the Schengen Borders Code as regards the use of the EES were adopted in 2017. Furthermore, in 2018 legislation was also adopted as regards the establishment of a European Travel Information and Authorisation

was primarily driven by the expectation and promise of technical solutions to identifying terrorists with external border controls being a place of particular importance.⁴³

Among the problems with a border control approach (intra-Schengen or external) to effective anti-terrorism is that it lacks strong evidence. According to TE-SAT, Europol's annual EU Terrorism Situation and Trend Report 2021, the EU suffered 10 'Jihadi' terror attacks in 2020. Five of the ten attackers (whether EU citizens or otherwise) had entered the EU as asylum seekers or irregularly, but all but one had entered a substantial number of years before the relevant attack. It would seem that the role of external border controls was somewhat distant and, in any event, those who carried out the attacks did not enter the EU with the objective of carrying out a terrorist attack.⁴⁴ From the TE-SAT descriptions of the attacks, there does not appear to have been any intra-Schengen movement at all in respect of them.

As France was the object of all three substantial terrorist attacks in the EU in 2015 (January, July and November) it is understandable that from the perspective of the French authorities that there was a problem. Whether border controls are the solution is another question. However, the Commission did not challenge the French choice of re-introduction of intra-Schengen border controls as a counter-terrorism measure. In the prolongation notification of 29 March 2016,⁴⁵ the French authorities noted that the three-month state of emergency in France from 13 November 2015 until 13 February had been renewed for a further three months hence the French authorities were extending their re-introduction of border controls for a similar period (this has been continued and the essential elements of the emergency measures have been converted into a normal law in 2020).⁴⁶ A further notification on 25 April 2016⁴⁷ by

System (ETIAS).' For a critique see Julien Jeandesboz, 'European border policing: EUROSUR, knowledge, calculation' (2017) 18(3) *Global crime* 256; Karine Côté-Boucher, 'Smart Borders? Customs, Risk Targeting, and Internal Politics in a Border Agency' (2019) *Security and Risk Technologies in Criminal Justice: Critical Perspectives* 225.

43 Niovi Vavoula, 'Prevention, surveillance, and the transformation of citizenship in the "Security Union": The case of foreign terrorist fighters' (2018) Queen Mary School of Law Legal Studies Research Paper 293.

44 Europol, 'European Union Terrorism Situation and Trend Report' (2021) 43 <<https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-2021-tesat>> accessed 20 August 2021.

45 Council Document 7360/1/16.

46 Henk van Houtum and Rodrigo Bueno Lacy, 'The political extreme as the new normal: the cases of Brexit, the French state of emergency and Dutch Islamophobia' (2017) 195(1) *Fennia. International Journal of Geography* 85.

47 Council Document 8217/16.

the French authorities stated that ‘in light of the major ongoing terrorist threat, illustrated by the attack on Brussels on 22 March 2016, the French Government has decided to extend these border controls until 26 May 2016 inclusive.’ The Council no longer makes public the justifications given by Member States for the introduction or continuation of intra-Schengen border controls.

As an alternative to protect the integrity of the Schengen border-control free area, the Commission chose to recommend that Member States increase police checks in border areas as an alternative to controls related to migration or security.⁴⁸ This option, however, is problematic for many Schengen States as identity checks in border areas have been successfully challenged on the basis that the police carry them out on the basis of unlawful racial profiling.⁴⁹ Article 19 TFEU provides the power for the EU to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The competence was exercised through the adoption of secondary legislation first in 2000⁵⁰ and the CJEU has interpreted various provisions of it more than fifteen times.⁵¹ However, this case law of the Court does not integrate the anti-discrimination measures with border controls, not least as the secondary legislation adopted under Article 19 TFEU specifically excludes its application to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the

48 Commission Recommendation (EU) 2017/820 on proportionate use of police checks and police cooperation in the Schengen area [2017] OJ L122; Commission Recommendation (EU) 2017/1804 of 3 October 2017 on the implementation of the provisions of the Schengen Borders Code on temporary reintroduction of border control at internal borders in the Schengen area [2017] OJ L259.

49 Alexandra Sandacz, ‘German Court Overrules Decision to Allow Racial Profiling’ (Impunity Watch, 9 November 2012) <<https://impunitywatch.com/german-court-overrules-decision-to-allow-racial-profiling/>> accessed 22 August 2021; Anna Hettrich, ‘Racial Profiling in Europe: How well equipped is National, International and Supranational Human Rights Law to counter it?’ (2018) 21(1) ZEuS Zeitschrift für Europarechtliche Studien 111; Marie De Somer, ‘Schengen and internal border controls’ in Phillipe de Bruyker, Marie de Somer and Jean-Louis De Brouwer (eds) *From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration* (European policy Centre 2020); Jelmer Brouwer, Maartje van der Woude and Joanne van der Leun, ‘(Cr) immigrant framing in border areas: decision-making processes of Dutch border police officers’ (2018) 28(4) Policing and Society 448.

50 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L80.

51 <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0043>> accessed 21 August 2021.

legal status of the third-country nationals and stateless persons concerned (Article 3(2) Directive 2004/43).

In the border control context, though, in 2017 the CJEU⁵² found unlawful a national law which conferred on the police the power to check the identity of any person, within an area of 30 kilometres from that Member State's land border with other Schengen states, with a view to preventing or terminating unlawful entry into or residence or preventing certain criminal offences which undermine the security of the border, irrespective of the behaviour of the person concerned and of the existence of specific circumstances. Such powers would need to be contained in legislation laying down the necessary framework for that power ensuring that the practical exercise of it cannot have an effect equivalent to that of border checks. The Court did permit the carrying out, on board trains and in railways stations, of identity or border crossing document checks on persons, and briefly to stop and question any person for that purpose, if those checks are based on knowledge of the situation or border police experience, provided that the exercise of those checks is subject under national law to detailed rules and limitations determining the intensity, frequency and selectivity of the checks (which may also require rules to prevent unlawful racial profiling). Hence, the Commission's proposal to extend the use of police checks in border areas is somewhat ambiguous as regards the border control judgments of the CJEU, the prohibition of racial discrimination and national courts' limitations on racial profiling. In the context of the central question of this paper, it can be analysed as an effort to protect the Schengen border control free area among Schengen states individually but pushing police controls (even those with a border control dimension) inside the constitutional framework of policing within the Schengen states as this is not an EU competence. In contradistinction with the export of border control to the external border and the search for cooperation with third states to carry out exit controls, this strategy re-inserts controls on persons inside the Schengen states as a wholly internal matter to be regulated by national constitutions.

More generally, the mix of terrorist attacks in various Schengen states as a ground for justifying the re-introduction of temporary intra-Schengen border controls on persons indicates the tensions between 'Europeanisation' as a fact of life and the panicked interior ministries attempts to re-nationalise border controls on persons as a solution to terrorism.⁵³ In any event, in a response to the concerns, the EU updated and hardened its anti-terrorism legislation

52 Case C-9/16 A, EU:C:2017:483.

53 European Parliament, 'Foreign fighters – Member State responses and EU action' (2016) <<https://www.europarl.europa.eu/EPRS/EPRS-Briefing-579080-Foreign-fighters-re-v-FINAL.pdf>> accessed 20 August 2021.

in 2017⁵⁴ including both a criminal justice approach within the EU and partnership with third countries. In the 2017 directive, the EU legislator clarified the issue of so-called foreign fighters, designating them as individuals (i.e. EU citizens) who travel abroad for the purpose of terrorism. But it is their return from abroad which is among the focuses of the measure: 'returning foreign terrorist fighters pose a heightened security threat to all Member States. Foreign terrorist fighters (i.e. EU citizens) have been linked to recent attacks and plots in several Member States. In addition, the Union and its Member States face increased threats from individuals who are inspired or instructed by terrorist groups abroad but who remain within Europe' (preamble 4). It calls for strong coordination through Europol and Eurojust as regards the intra-EU dimension and as regards the global character of terrorism, the need for an international answer which required the Union and its Member States to strengthen cooperation with relevant third countries (preamble 7).

Nonetheless, by August 2021, six Schengen states⁵⁵ were still maintaining intra-Schengen border controls on the grounds of the risk of terrorism. In fact, these are the same six states which are maintaining intra-Schengen border controls on persons on grounds of mass movement of persons. In the justifications for six years of temporary border controls, all of these states have been chopping and changing their border control justifications from movement of persons to terrorism and back again as the time limit for each ground of justification under the SBC expires.⁵⁶

5 Schengen and COVID-19

On 11 March 2020, the World Health Organisation made an assessment that COVID-19 should be categorised as a pandemic.⁵⁷ From the beginning of March 2020, various Schengen States began to re-introduce temporary border controls on the movement of persons in the Schengen area.⁵⁸ France was the first and notified the Commission and Council it was applying border controls

54 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88.

55 Austria, Denmark, France, Germany, Norway and Sweden.

56 Marie De Somer (n 49).

57 <<https://www.who.int/news/item/27-04-2020-who-timeline---covid-19>> accessed 21 August 2021.

58 <https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control.pdf> accessed 21 August 2021.

at all internal Schengen borders. On 11 March, Austria notified the EU institutions of the introduction of temporary border controls but only to land borders with Hungary, Italy and Slovenia. Hungary re-introduced temporary border controls on 12 March for land borders with Austria and Slovenia. The next day Austria extended its border controls to include Switzerland and Liechtenstein. Switzerland then introduced controls on 23, 25, 26 and 28 March respectively regarding land borders with Italy, France and Germany and all air borders except with Liechtenstein. Lithuania reintroduced controls on all internal borders on 24 March, Estonia following suit on 27 March. Poland moved on 25 March with controls on land borders with Czechia, Slovakia, Germany, Lithuania as well as sea and air borders.

Germany introduced border controls on 26 March for internal land and air borders with Austria, Switzerland, France, Luxembourg, Denmark (including sea borders), Italy and Spain. On the same day, Portugal started controls on the land border with Spain and Norway introduced them for all internal borders. The following day, Spain commenced controls on all land borders. Belgium followed on 30 March (all internal borders) and Czechia on 4 April limited to land borders with Germany and Austria but including all air borders. Finland came next with controls on all internal borders from 14 April. Slovakia joined the group on 17 April with controls on all internal borders and Iceland on 24 April. This meant that 16 out of 26 Schengen states had reintroduced intra-Schengen border controls by 24 April 2020. Thereafter, according to the European Commission's records, these states extended the time of application of the controls and in some cases changed the countries or modes of transport covered (Portugal remained faithfully only applying controls to land borders with Spain). However, according to the Commission,⁵⁹ by the first half of May 2021 only three Schengen States were still applying temporary border controls on COVID-19 grounds: Denmark, France and Norway.

The history of the use of intra-Schengen border controls on COVID-19 grounds needs of course to take into account the development and propagation of the virus. However, this is beyond the scope of this paper. What is important for my purposes, is the choice to use border controls at all as a means of controlling the spread of the virus. While this was an initial choice of the majority of Schengen states, ten did not see this as an appropriate response. This may have been triggered by the fact that the SBC does not expressly permit the re-introduction of temporary intra-Schengen border controls on persons

59 https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en accessed 21 August 2021.

on grounds of public health (Article 25(1)).⁶⁰ Instead, the justification on COVID-19 grounds of temporary border controls had to be shoehorned into internal security. The SBC does permit public health as a ground to refuse a person entry at the external border (Article 6 SBC).⁶¹ The problem with using border controls as a means of fighting spread of the COVID-19 virus in the EU is that it presupposes that what happens at a border crossing point is relevant to the containment of the disease. As all EU citizens and their third country national family members have a right to cross intra-EU borders (Article 21 TFEU, Article 6 Directive 2004/38), controlling them at the intra-Schengen borders presents legal problems. While the right of free movement of persons in Article 21 TFEU and the secondary legislation does permit a Member State to refuse entry on the ground of public health, this is only permitted in respect of diseases with epidemic potential as defined by the WHO relevant instruments or if the disease is subject to the same restrictions on nationals. So, while this would cover countries like Australia which prohibited the entry of its own nationals on COVID-19 grounds,⁶² it is not clear that any Schengen state took such a draconian measure.

From a practical perspective, border controls are also problematic as regards people with illnesses. Where a person who is unwell arrives at a border crossing point (land, air or sea) what they need above all else as a matter of public health is treatment. The more contact they have with border guards, other passengers etc the greater the risk of contagion. Thus, controls at border crossing points themselves are of dubious value as measures against contagious diseases. Instead, requiring passengers to obtain health tests/certificates before

60 Article 25(1) SBC 'Where, in the area without internal border control, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days. The scope and duration of the temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat.'

61 Article 6 SBC 'For intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay, the entry conditions for third-country nationals shall be the following: [...] (e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national data bases for the purposes of refusing entry on the same grounds.'

62 Nino Bucci, 'Australia's ban on travellers returning from India due to Covid crisis may be unlawful' (The Guardian, 1 May 2021) <<https://www.theguardian.com/world/2021/may/01/australias-ban-on-travellers-returning-from-india-due-to-covid-crisis-may-be-unlawful>> accessed 9 October 2021.

travelling as a condition required by the state and implemented by the travel company is at least marginally more coherent.⁶³

The European Commission was very active trying to convince Member States to allow intra-EU travel⁶⁴ and rapidly set up a website with up-to-date information on controls and requirements for passengers by Member State.⁶⁵ Among the movement of persons related measures which the Commission took were: Guidelines for border management measures to protect health and ensure availability of goods and essential services;⁶⁶ Guidelines on free movement of workers;⁶⁷ Emergency assistance in cross-border health care;⁶⁸ Council Recommendations 2020/1475 and 2021/119 for a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic.⁶⁹ These measures shared rather limited objectives and a timid approach to the central problem of border closures as an obstacle to movement of persons. The Commission sought to convince Schengen states to open their borders at least for the purposes of the movement of goods (in the face of shortages of essential items in a number of states as transport systems were disrupted).⁷⁰ The Commission developed the policy of Green Lanes to ensure that border crossings remained open for freight vehicles to ensure supplies of goods and services focusing on the immense political problem of shortages and hoarding

63 Communication from the Commission, Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak [2020] OJ C102L.

64 Elspeth Guild and Kathryn Allison 'As the Corona pandemic worsens, EU borders shut down: "A new low point for the EU's respect for refugee rights and international law"' (Protect, 16 April 2020) <<https://protectproject.wuib.no/blog-as-the-corona-pandemic-worsens-eu-borders-shut-down-a-new-low-point-for-the-eus-respect-for-refugee-rights-and-international-law/>> accessed 21 August 2021.

65 <<https://reopen.europa.eu/en>> accessed 21 August 2021.

66 Communication from the Commission, Guidelines for border management measures to protect health and ensure the availability of goods and essential services [2020] OJ C 86L.

67 Communication from the Commission, Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak [2020] OJ C102L.

68 Communication from the Commission, Guidelines on EU Emergency Assistance on Cross Border Cooperation in Healthcare related to the COVID-19 crisis [2020] OJ C11L.

69 Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic [2020] OJ L337; Council Recommendation (EU) 2021/119 of 1 February 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic [2021] OJ L36L.

70 Veronica Toffolutti, David Stuckler and Martin McKee, 'Is the COVID-19 pandemic turning into a European food crisis?' (2020) 30(4) *European Journal of Public Health* 626; Maria Nicola et al., 'The socio-economic implications of the coronavirus pandemic (COVID-19): A review' (2020) 78 *International Journal of Surgery* 185.

of essential goods.⁷¹ The necessity of movement of persons in this context was that of personnel in the transport industry, in particular drivers for whom exceptions should be made.

As travel restrictions transformed from border closure as such, to immense obstacles to movement caused by lengthy quarantine periods, successive testing of various specific types and from March 2021 evidence of vaccinations of certain permitted types, the Commission's position became more dynamic. On the one hand, the Commission sought to establish common rules on the crossing of the Schengen external border with common criteria for the extra-EU movement of persons through rapidly updated lists of third countries and appropriate external border measures in respect of their citizens.⁷² This reinforced the politics of externalising border controls to take political pressure off intra-Schengen border controls. On the other hand, it proposed the EU Digital Covid Certificate as a common and universally recognised system of certification of the health status of EU residents.⁷³ This proposal for a certificate, intended to be digital but in practice also available in printed form, was accepted by the legislator and became law on 14 June 2021. It side-lined the long standing WHO international certificate of vaccination which has been (and continues to be for other vaccinations) the gold standard around the world.⁷⁴

There is also another question about the EU regulation, which is its legal basis. According to the regulation it has only one legal basis – Article 21(2) TFEU which states that if action by the Union should prove necessary to attain the free movement of persons objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights of free movement. The legislative use of EU provisions of this kind has the effect of extending EU competences

71 Michael Keane, and Timothy Neal, 'Consumer panic in the COVID-19 pandemic' (2021) 220(1) *Journal of Econometrics* 86; Colleen P. Kirk and Laura S. Rifkin, 'I'll trade you diamonds for toilet paper: Consumer reacting, coping and adapting behaviors in the COVID-19 pandemic' (2020) 117 *Journal of Business Research* 124.

72 <<https://reopen.europa.eu/en>> accessed 21 August 2021.

73 Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic [2021] OJ L 211.

74 Eskild Petersen et al., 'COVID-19 vaccines under the International Health Regulations – We must use the WHO International Certificate of Vaccination or Prophylaxis' (2021) 104 *International Journal of Infectious Diseases* 175.

beyond what has been agreed in the EU treaties.⁷⁵ It has been much criticised by academic scholars in particular as regards the role of national parliaments as the legitimate decision makers of EU powers.⁷⁶ So, after a year and a half of rather lukewarm approaches to the COVID-19 challenge to free movement of persons, the Commission and the EU legislator took an audacious approach to extending EU powers to assist EU citizens to recover the right to move. Of course, it may be argued that EU citizens have the right to move freely across the EU Member States as stated in Article 21(1) TFEU, the detail contained in Directive 2004/38 and, so, the EU Digital Covid Certificate is a new obstacle to free movement not foreseen by the treaty and therefore unlawful. It remains to be seen whether such a challenge is mounted. What is evident is that the differential treatment of own citizens and EU ones as regards the crossing of intra-Schengen borders is diminishing, even though a number of Schengen States are continuing to apply intra-Schengen border controls on persons as part of their strategy. The Commission launched a strongly worded Communication: A Strategy towards a fully functioning and resilient Schengen Area⁷⁷ in June 2021, focusing on breaking the cycle of exceptional intra-Schengen border controls by insisting on the legal and economic value of no-borders Europe and the capacity of new technologies (digital, interoperability etc) to replace the security concerns of some Schengen states regarding the external border (and to some extent the internal border as well).

6 Conclusions

In this paper I have set out the three substantial challenges for the Schengen area as one without intra-Schengen border controls on the movement of persons. My argument is that as regards the first two – the arrival of asylum seekers in 2015–16 and a series of terrorist attacks affecting a small number of Schengen states from 2015 onwards – where some Schengen states re-introduced temporary border controls on the movement of persons, the EU institutions and, in particular, the Commission sought to re-position the problem as one of the

75 Jacob Öberg, 'Subsidiarity as a Limit to the Exercise of EU Competence' (2017) 36 Yearbook of European Law 391.

76 Ian Cooper, 'The watchdogs of subsidiarity: National parliaments and the logic of arguing in the EU' (2006) 44(2) Journal of Common Market Studies 281.

77 Communication from the Commission to the European Parliament and the Council 'A strategy towards a fully functioning and resilient Schengen area', COM(2021) 277 final, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0277>> accessed 9 September 2021.

Schengen external border where additional and stronger action needed to be taken to prevent the arrival of unwanted persons. When the limitations of that strategy became apparent, the Commission recommended that instead of intra-Schengen border checks, both to find potential asylum seekers or terrorists, these checks should be internalised inside the Schengen states' territory and constitutional law systems and thus, at least arguably outside the scope of the Schengen rules.

The third challenge to the Schengen border control free system has been particularly intense and protracted: Schengen states' response to the COVID-19 pandemic. This commenced in March 2020 and included more than half of the Schengen states re-introducing intra-Schengen state border controls (sixteen out of twenty-six countries) though the lifting of these controls has taken place much faster than for the first two challenges. In fact, those Schengen states which are still applying intra-Schengen controls on COVID-19 grounds are mainly the same as those which are applying them for migration and anti-terrorism purposes. So, there is a strong convergence regarding which Schengen states perceive border controls as an important political solution to various diverse and unrelated issues and challenges.

The response of the EU institutions has been somewhat different in respect of the COVID-19 challenge than the other two, not least as the effects of the later have been much more severe as regards its impact on the EU population and economy. In this case, there was no real possibility to turn the COVID-19 pandemic into an external border issue. Demonising China has not been an acceptable option.⁷⁸ Instead, from a rather timid start, the institutions have become much more robust in their defence of a border control free Schengen area even to the point of appropriating legislative powers to further a re-opening of the area. The slogan of the EU now as stated in the Commission's communication is 'restoring the Schengen area without controls at internal borders is of paramount importance to the European Union as a whole.'⁷⁹ In general the Schengen system as been surprising resilient in practice notwithstanding various state measures to limit border control free movement on a variety of grounds. However, in the first two types of crises, the EU Commission and Council chose to frame the issue as one at the external border and thus the measures adopted were for the purpose, at least as stated, of protecting

78 Yunpeng Zhang and Fang Xu, 'Ignorance, Orientalism and Sinophobia in Knowledge Production on COVID-19' (2020) 111(3) *Tijdschrift voor economische en sociale geografie* 211; Keetie Roelen et al., 'COVID-19 in LMICs: the need to place stigma front and centre to its response' (2020) 32(5) *The European Journal of Development Research* 1592.

79 COM(2021)277 p 3.

the border control free Schengen internal area. However, the third crisis, the COVID-19 pandemic, has required a different approach. In light of the measures adopted by Member States to counter the risk, it was not possible to construct the issue as one of a failure at the external border. Instead, the EU is faced with a challenge of re-thinking what intra-Member State border controls are for and whether they are, in reality, an effective measure to control a pandemic or rather a reflex action of some interior ministries to deflect incisive reflection on the role of intra-Schengen border controls. Such a larger review might well reveal more fundamental flaws in the security reasoning preferred by some state actors in favour of border controls than those presented by the challenge of containing the COVID-19 pandemic.