



INSIGHT

THE COVID-19 EMERGENCY AND THE REINTRODUCTION OF INTERNAL BORDER CONTROLS IN THE SCHENGEN AREA: NEVER LET A SERIOUS CRISIS GO TO WASTE

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ABSTRACT: The *Insight* analyses the wave of internal border control reintroductions following the COVID-19 outbreak. It addresses the relevant legal framework and discusses the possible implications for the Schengen Area, in the light of the recent practice of highly disputed prorogations of border controls and of the pending reform of the Schengen Borders Code.

KEYWORDS: COVID-19 and the EU – Schengen – internal border – control – reintroduction – reform.

I. THE COVID-19 CRISIS AND THE ISSUE OF BORDERS AND CROSS-BORDER MOBILITY

Across the world, mobility restrictions are playing a paramount role in the public authorities' reaction to the spread of the Coronavirus. Aside from the numerous examples of draconian measures at domestic level, the supranational dimension of the fight against COVID-19 through varied forms of mobility restrictions raises specific challenges, particularly in areas characterised by advanced integration models, such as the European Union and the Schengen Area.

In the latter context, the pandemic is a stress-test for some of the founding pillars of free movement and border management, from three complementary perspectives: the closure of EU external borders, the imposition of travel bans by the national authorities, and the unilateral reintroduction of controls at internal borders.

The first aspect is a political hot potato, as it involves several bilateral issues of reciprocity with Third States, developing in line with the evolution of the health emergency. For

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instance, the European Council unanimously decided to restrict access to the EU territory from the outer world¹ a few days after its President and the President of the Commission had criticised a similar decision taken by the US authorities.² Interestingly, despite the recent trend towards a strengthened role for the EU and its legislation in the management of external borders, the response to the COVID-19 crisis took the shape of merely non-binding Commission guidelines,³ aimed at proposing a ban on non-essential travel to the EU and at coordinating actions taken individually by the Member States in that respect.

The second element poses direct challenges to free movement, as it imposes unprecedented restrictions on the mobility of persons within the Union. In principle, travel bans appear to be covered by Art. 29 of Directive 2004/38/EC,⁴ which allows the Member States to limit free movement in the event of a “disease with epidemic potential”. On the one hand, the Court of Justice case law suggests that the Member States enjoy wide discretion when tackling actual risks to essential societal interests.⁵ On the other hand, this does not amount to *carte blanche*, as the respective national measures must in any case meet the principle of proportionality.⁶ Moreover, the procedural safeguards envisaged by Arts 30 and 31 of the Directive must be ensured.⁷ Compliance with these requirements is not taken for granted in the current scenario, where the Member States are required to achieve a difficult balance between different levels of contagion and preventing the further spread of the virus.⁸

Lastly, several States have coupled travel bans with a temporary reintroduction of controls at their borders with other members of the Schengen Area. At first sight, these

¹ European Council, Conclusions by the President of the European Council of 17 March 2020 following the video conference with members of the European Council on COVID-19, www.consilium.europa.eu.

² Joint Statement by the President von der Leyen and President Michel on the U.S. travel ban of 12 March 2020, ec.europa.eu.

³ Communication COM(2020)115 final from the Commission of 16 March 2020, *COVID-19: Temporary Restriction on Non-Essential Travel to the EU*. See also Communication COM(2020) 250 final from the Commission of 30 March 2020, *COVID-19 Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy*.

⁴ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

⁵ The Court has also consistently clarified that concerns related to public order and public security – as well as their perception and implications – can vary from State to State, depending on the circumstances, and may therefore require different reactions. Court of Justice, judgment of 12 May 2012, case C-348/09, *P.J.*, para. 22.

⁶ Art. 27, para. 2, Directive 2004/38, cit.

⁷ In particular, the right to receive all relevant information and to be notified in writing of any expulsion decision, as well as the right to judicial or – where appropriate – administrative redress.

⁸ The measures adopted by the Member States and the legal problems that they raise from an EU law perspective have been discussed initially by D. THYM, *Travel bans in Europe. A legal appraisal*, in *EU Migration Law Blog*, 18 and 19 March 2020, eumigrationlawblog.eu.

initiatives are less disputed from a legal point of view, as they can rely on the specific legal bases provided by the Schengen Borders Code (SBC),⁹ namely Arts 25 and 28. However, they are worthy of attention, as they fuel the tensions currently underlying the Schengen Area and could influence the heated debates surrounding the pending reform of the rules on the reintroduction of internal border controls.¹⁰

Bearing in mind the complex scenario outlined above, which raises inherent issues of solidarity within the Union, this *Insight* focuses on the measures taken at the Schengen internal borders as a reaction to the health emergency. The analysis addresses the factual and legal background (Section II) and then briefly discusses its possible implications on the current situation and on the future development of the Schengen Area (Section III). The concluding remarks uphold the legitimacy of current reintroductions of border controls, but also warn on the need for future research and oversight on how the Member States will further resort to the health emergency justification in the months to come (Section IV).

II. THE TEMPORARY REINTRODUCTION OF CONTROLS AT THE SCHENGEN INTERNAL BORDERS IN THE AFTERMATH OF THE COVID-19 PANDEMIC AND THEIR LEGAL BASES

The SBC provides three temporary derogations to the abolition of internal border controls. The “exceptional circumstances” clause enshrined in Art. 29 SBC can be set aside, as the relevant provisions refer to risks affecting the overall functioning of the area without internal border control specifically deriving from serious deficiencies in the carrying out of external border control. On the contrary, Arts 25 and 28 SBC are worthy of closer attention in the current contingency. The former governs the general framework for temporary border control reintroductions, so long as they are necessary to tackle foreseeable events causing serious threat to public policy or internal security. The latter introduces a partially specific regime for those unforeseen or unforeseeable situations where “a serious threat to public policy or internal security in a Member State requires immediate action to be taken”.

These provisions are complementary in nature and differ in relation to the procedure for reinstating controls. For instance, prior notification of the planned reintroduction to the other Member States and to the Commission is required under Art. 25,¹¹ whereas pursuant to Art. 28 reintroduction and notification must be simultaneous.¹² The maximum duration of the controls and their prolongations is different as well,

⁹ 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).

¹⁰ See *infra*, Section III.

¹¹ Art. 27, para. 1, SBC.

¹² *Ibid.*, Art. 28, para. 2.

namely six months under Art. 25 SBC and two months for cases requiring immediate action. In both cases, moreover, the measures adopted unilaterally by the national authorities must comply with the principles of necessity and proportionality – particularly in terms of duration and territorial scope – and must be specifically motivated.¹³

Between the first ten days of March and the beginning of April, the COVID-19 crisis required 13 States of the Schengen Area to rely on the possibility of reinstalling internal border controls on the grounds of a threat requiring immediate action.¹⁴ A further 3 States – namely Finland, Denmark and France – invoked the foreseeable events clause, pursuant to Art. 25 SBC, although only the former notified this measure purely and solely as a means of limiting contagion. Instead, France and Denmark notified *in itinere* the additional coronavirus justification to already ongoing controls, respectively based on persistent terrorist threat and migrants' secondary movements. Austria and Norway enacted both options in parallel, whereas Germany resorted to Art. 28 SBC while maintaining pre-existing controls under Art. 25 SBC on grounds of migrants and asylum seekers' secondary movements and of the situation at the EU external borders.

Most of the outlined temporary reintroductions cover all internal borders, sometimes expressly including air borders, with limited exceptions, such as the Czech Republic's decision to leave the borders with Poland and Slovakia untouched.¹⁵

In principle, reinstating border controls means that mobility can take place only at authorised official crossings,¹⁶ so that thorough checks can be conducted. In this respect, Art. 32 SBC states that the relevant rules on checks at external borders under Title II SBC shall apply, *mutatis mutandis*. As the Court of Justice has clarified, this provision does not mean that internal borders are suddenly transformed into external ones.¹⁷ Nonetheless, the broad wording of Art. 32 SBC gives the Member States discretion as to the processes to be conducted at internal border checks, aside from minimum identity checks.¹⁸ In this context, Austria notified its intention to perform spot

¹³ *Ibid.*, Arts 25, para. 1, and 28, para. 3.

¹⁴ The full list of notifications, including some information on their legal basis, the territorial scope of application and the justifications can be consulted at ec.europa.eu.

¹⁵ Updated information can be accessed at www.mvcr.cz.

¹⁶ The list of authorised crossing points notified to the Commission in the framework of the coronavirus-related temporary reintroductions of border controls can be consulted at ec.europa.eu.

¹⁷ Court of Justice, judgment of 19 March 2019, case C-444/17, *Arib*. The Court confirmed the Commission's view, also expressed in Communication COM(2010) 554 from the Commission of 13 October 2010, *Report on the application of Title III (Internal Borders) of Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, p. 9.

¹⁸ The Court of Justice case law underscores that, in any event, control at the internal and external borders must fully respect human dignity. Moreover, the Member States are expected to set up a system of appropriate legal and judicial remedies to ensure the protection of the persons claiming a violation of their rights. Court of Justice, judgment of 13 January 2013, case C-23/12, *Mohamad Zakaria*, para. 40.

health checks, a decision which triggered harsh political reactions and similar (non-notified) measures by other Member States, such as Slovenia.¹⁹

III. THE COMPATIBILITY OF COVID-19 EMERGENCY-RELATED REINTRODUCTIONS OF BORDER CONTROLS WITH THE SBC AND THEIR POSSIBLE IMPLICATIONS FOR THE SCHENGEN AREA

From a legal point of view, at present, the temporary reintroductions based upon the COVID-19 epidemic are hardly questionable.

At first sight, Arts 25 and 28 do not refer to public health justifications, as, instead, is the case with the Treaty provisions regarding freedom of movement²⁰ and with Art. 29 Directive 2004/38. However, the actual and imminent collective risks connected to the rapid spread of an epidemic fit the Court of Justice case law defining the scope of public policy and internal security. The notion of public policy usually refers to threats to fundamental societal interests;²¹ the second involves situations affecting the internal or external security of a Member State, for instance, stemming from the disrupted provision of essential public services.²²

Moreover, most of the reintroductions currently in place are at an early stage of implementation. The different phases of the first wave of contagion reached by the Member States – some of which, at the time of drafting this *Insight*, are still waiting for the peak of propagation to occur – provide solid substance to the public policy justification and allay concerns as to their necessity and proportionality.

Lastly, in the wake of the emergency, soon after receiving the first notifications pursuant to Art. 25 SBC, the Commission itself acknowledged that, in principle, border controls could be used as part of the national anti-epidemic toolbox.²³

Moreover, the Commission urged the national authorities to strike an appropriate balance between health protection and the equally paramount objective of securing effective intra-EU mobility. The guardian of the Treaties highlighted that the management of internal borders can have serious cross-sector implications on a number of key aspects of European peoples' lives, such as (un)interrupted delivery of goods and provi-

¹⁹ Interestingly, the Commission's guidelines for border management measures point out that the conduct of health checks on all persons entering the territory of Member States in principle does not require the formal introduction of internal border controls. See Communication COM(2020) 1753 from the Commission of 16 March 2020, *Guidelines for border management measures to protect health and ensure the availability of goods and essential services*, para. 20.

²⁰ See for instance Art. 45, para. 3, TFEU.

²¹ See, for instance, Court of Justice, judgment of 13 September 2016, case C-304/14, *CS*, para. 38, and the case law referred to therein, in relation to public order and the free movement of persons.

²² See, inter alia, Court of Justice, judgment of 10 July 1984, case 72/83, *Campus Oil*, para. 34.

²³ Communication COM(2020) 1753, cit., para. 18.

sion of essential services or the smooth cross-border mobility of persons, including, in particular, the many thousands of European frontier workers.

The Commission's warning provides food for thought (as well as some concerns) for the months to come, on three main grounds.

Firstly, the recent practice of temporary reintroductions of border controls reveals that the Schengen Area is still suffering from enduring loopholes. In 2015, following the pressure on the Dublin system and the ensuing massive flows of migrants and asylum seekers, some Member States ignited a chain of border control reinstatements.²⁴ Since then, six Members of the Schengen Area – Austria, Denmark, France, Germany, Sweden and Norway – have continued to conduct border controls.²⁵

In particular, these Member States have managed to justify their border controls by shifting from one legal basis to another, whenever the respective maximum period expired.²⁶ On some occasions, they also based their notifications on slightly different justifications, to further secure continuity of (temporary) reintroductions over the months and years.²⁷ In this respect, the justifications in question often fall short of demonstrating the necessity and proportionality of border controls. For instance, despite official statistics showing a significant drop in the arrival of asylum seekers from 2016 onwards, recurring and generic reference is made to the threats deriving from asylum seekers' secondary movements or – even more broadly – to the situation at the EU external borders.²⁸

At the outset, the initiatives appeared to be a surface-level reaction to much deeper political tensions. Yet, the sequence of several prorogations marked an enduring departure from a founding pillar of the SBC, affecting a coherent EU-wide approach to migration policy and thereby fragmenting the Schengen Area through the centrifugal force of national sovereign ambitions. This led a temporary remedy to contingent critical situations to be used as an ordinary mechanism *de facto* re-shaping the Schengen system, even following the reform of the SBC between 2015 and 2016.

In this framework, despite the widespread criticism, EU institutions have thus far failed to challenge this practice. The European Parliament has repeatedly and unsuc-

²⁴ For an in-depth analysis see B. RYAN, *The Migration Crisis and the European Union Border Regime*, in M. CREMONA, J. SCOTT (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law*, Oxford: Oxford University Press, 2019, p. 197 *et seq.*

²⁵ For the full list of subsequent notifications see ec.europa.eu.

²⁶ M. DE SOMER, *Schengen and Internal Border Controls*, in M. DE SOMER, P. DE BRUYCKER, J-L. DE BROUWER (eds), *From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration*, Brussels: European Policy Centre, 2019, p. 119 *et seq.*

²⁷ A close analysis of the justifications provided by the Member States is conducted by S. CARRERA, *The State of the Schengen Area in the Light of the 2019 European Parliament Election*, in *RSCAS Policy Papers*, 2019/12, cadmus.eui.eu.

²⁸ See *supra*, footnote no. 14.

cessfully raised concerns as to the lawfulness of the outlined situation.²⁹ The Commission, while performing its monitoring tasks, has never complained about the situation or called for a termination of enduring border controls.³⁰ Moreover, it has not exploited all the monitoring tools provided by the Schengen Evaluation System,³¹ such as visits *in loco* and interviews with the competent national authorities.

The political turmoil referred to briefly above and the legal inconsistencies surrounding the implementation of the clauses on the temporary reintroduction of border controls are closely intertwined with a second critical factor. The inherent nature of the epidemic and its evolution over time encourages blurred and fragmented reactions at domestic level. Also due to the lack of centralised EU competence on the management of health emergencies,³² the Member States have provided sufficient evidence of the difficulty in coordinating their efforts and in conducting shared initiatives.³³ The variety of national responses is likely to persist – or even to increase in intensity – in the next phases of the epidemic, where the risk of a second outbreak of contagion following the end of the manifold national lockdowns and other restrictive measures will again require the Member States to take action. Depending on elements such as the territorial coverage of the epidemic, its intensity and the national governments' political priorities, temporary reintroductions of border controls could be lifted, reiterated or even exacerbated, thereby amplifying fragmentation and further affecting the crisis of the whole Schengen Area.

In this framework, the aforementioned recent practice of some Member States constitutes an uncomfortable precedent. Bearing in mind the EU institutions' attitude to it, one could hardly expect the Commission to challenge a new season – or, sadly, a

²⁹ See, for instance, the European Parliament Resolution of 30 May 2018 on the annual report on the functioning of the Schengen Area, available at www.europarl.europa.eu.

³⁰ In 2017, the Commission argued that migration and asylum could no longer constitute legitimate grounds for derogating Schengen pursuant to the exceptional clause of Art. 29 SBC. However, the subsequent strategy adopted by the Member States under consideration has not been challenged further. See Communication 2017(570) final from the Commission of 27 September 2017, *Preserving and Strengthening Schengen*.

³¹ See Council Regulation (EU) 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen.

³² F. CASOLARI, *Prime considerazioni sull'azione dell'Unione ai tempi del Coronavirus*, in *Eurojus*, 2020, p. 95 *et seq.*

³³ For a similar reflection in relation to other EU policies see C. BEAUCILLON, *International and European Emergency Assistance to EU Member States in the COVID-19 Crisis: Why European Solidarity Is Not Dead and What We Need to Make It both Happen and Last*, in *European Papers – European Forum, Insight* of 25 April 2020, www.europeanpapers.eu; S. COUTTS, *Citizenship, Coronavirus and Questions of Competence*, in *European Papers – European Forum, Insight* of 25 April 2020, www.europeanpapers.eu; B. PIRKER, *Rethinking Solidarity in View of the Wanting Internal and External EU Law Framework Concerning Trade Measures in the Context of the COVID-19 Crisis*, in *European Papers – European Forum, Insight* of 25 April 2020, www.europeanpapers.eu.

second phase of the current season – of prolonged controls justified (also) on the grounds of the health emergency.³⁴

However, the political and economic costs of a long-lasting “non-Schengen”³⁵ would be increasingly worrisome and difficult to justify.

Thirdly, the current additional boost to the crisis of the Schengen system makes the reform of the rules governing temporary reintroductions of border controls a topical issue. In this respect, the Commission exercised its power to initiate legislation in 2017.³⁶ The Commission proposed to extend the period for the reintroduction of border controls under Arts 25 and 29 SBC and to make reintroductions conditional upon the Member States drafting a risk assessment. The European Parliament reacted harshly to the proposed reform. The rapporteur clarified that “this proposal of the Commission was made to ‘legalise’ existing practices of Member States which are no longer in line with the current provisions of the Schengen Borders Code”.³⁷ Therefore, the Parliament is now calling for more stringent rules on the permitted maximum duration of border controls, and for stricter monitoring and evaluation mechanisms. The decision-making process formally managed to survive the elections of the European Parliament and the appointment of the new European Commission, but it is still stuck in limbo, due to the Council's delay in issuing its position with a view to the launch of inter-institutional negotiations. However, it is already clear that the negotiating mandate agreed by the Council – while labelling the reintroduction of border controls as a last resort measure – aims to achieve greater flexibility in favour of the Member States.³⁸

In this context, the difficulty of predicting the evolution of the current epidemic could provide substance to the Commission and the Council's will to avoid imposing additional constraints on the Member States. Needless to say, a *reformatio in pejus* of the current wording of the SBC would be highly questionable.

³⁴ To this respect, it must be underlined that the Commission's guidelines for border management Communication COM(2020) 1753, cit., at para. 18, clarify that in principle “an extremely critical situation” is required for a Member State to “identify a need to reintroduce border controls as a reaction to the risk posed by a contagious disease”. The stance taken by the Commission at least theoretically stresses the importance of solid justifications on the part of the Member States.

³⁵ The costs related to prolonged reintroductions of border controls are assessed in a study of the European Parliament of 2016, *The Cost of Non-Schengen. Impact of Border Controls Within Schengen on the Single Market*, available at www.europarl.europa.eu.

³⁶ Communication COM(2017) 57 final from the Commission of 27 September 2017 on a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border controls at internal borders.

³⁷ European Parliament, LIBE Committee, Report of 29 October 2018 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders, www.europarl.europa.eu.

³⁸ See the press release following the COREPER meeting where the mandate to negotiate with the Parliament was agreed: www.consilium.europa.eu.

IV. CONCLUDING REMARKS AND FUTURE RESEARCH PATHS

The Member States' decisions to either lift or prolong ongoing border controls reinstated in connection with the COVID-19 emergency will inevitably depend on the development of the pandemic. Some could profit from the situation and follow the footprint of the recent practice of stretching the SBC temporary reintroduction clauses beyond their maximum duration and the limits set by necessity and proportionality. Some others may not, but, in any event, the Schengen Area will continue to face national centrifugal forces affecting its coherence and effective functioning, as well as recurring political skirmishes between the Member States and within the EU institutional framework.³⁹ Crucially, this resounding background is inevitable, because of the inherent symbolic dimension connected to border management and the related (whether real or perceived) preservation of control and sovereign power. The development of the Schengen Area itself is the outcome of reactions to crises and of political contingencies. Ultimately, this state of recurring crisis has led to a gradual process of Europeanisation of border management in Europe.⁴⁰ The inherent nature of the propagation of the epidemic and the ensuing serious societal risks pose unprecedented challenges to the Schengen Area, especially if combined with the recent practice of prolonged reinstatements of border controls and with the Commission's failure to take appropriate action. However, they also represent an opportunity to tackle the tensions dismantling the original idea of an area without internal borders.

An agreement on some of the amendments to the Commission's proposal for a reform of the SBC and the effective oversight of the health emergency-related use of Arts 25 and 28 SBC and of its relationship with previous notifications is paramount in this respect.

Therefore, further monitoring and research are needed on the use that the Member States will make of the temporary reintroduction clauses over the next months. Their reactions – whether unilateral or coordinated – will tell us a lot about the state of health of the Schengen regime and could impact the pending reform process. The combination of border control reintroduction and travel bans requires deeper reflections as well, because of the unprecedented implications for the freedom of movement of persons in the Union.

³⁹ These appear to be a constant feature of the Schengen Area: G. CORNELISSE, *What's Wrong with Schengen? Border Disputes and the Nature of Integration in the Area Without Internal Borders*, in *Common Market Law Review*, 2014, p. 741 *et seq.*

⁴⁰ S. CARRERA, *The State of the Schengen Area*, *cit.*; R. ZAIOTTI, *Cultures of border control: Schengen and the evolution of European frontiers*, Chicago: Chicago University Press, 2011.

