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Internal Border Control in the Schengen Area and Health Threats: Any Lessons from the COVID-19 Pandemic?

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Abstract

The COVID-19 pandemic has exacerbated the Member States' overreliance on the rules of the Schengen Borders Code allowing for temporary reintroduction of border control and has questioned the institutional narrative of an EU-wide borderless area as a key achievement of the integration process. This article focuses on the legal implications of the border measures enacted by the Member States following the COVID-19 outbreak and discusses their compatibility with relevant EU law, also in the light of available epidemiological studies on the link between border controls and spread of the virus. The analysis contends that the pandemic has offered an unprecedented opportunity to pave the way to shared solutions to the enduring crisis of the internal dimension of the Schengen area, such as a detailed reform of the Schengen Borders Code and a reconsideration of the current governance of the Schengen area itself.

Keywords

Schengen – internal borders – reintroduction – health threat – COVID-19

1 Introduction

According to geopolitical studies, borders are frameworks in which human activities happen. Therefore, they should not be studied per se, as a material phenomenon, but, rather, in relation to the interconnections occurring across them. The Schengen Area is a particularly interesting example from this

viewpoint. Over the decades, it has managed to dismantle the traditional perception of borders as co-terminous of physical obstacles to mobility and absolute limits to sovereignty.¹ The traditional 'obsession'² for the defensive role that borders can play has gradually been replaced by a renewed and purely European obsession, in light of which 'les frontières n'ont intérêt qu'en vertu de leur disparition'.³ The integration process has led to a seemingly borderless Europe, where national borders still exist and divide but, at the same time, no longer play their traditional sacramental role of dividing us from 'the others'. More ambitiously, the Schengen Area's internal borders have become sources of cooperation between states and their regional or local authorities. In addition, the abolition of internal border control has proven to be an effective way of facilitating intra-EU mobility and has gradually become a distinctive symbol of the efforts put into achieving an ever-closer Europe.⁴

However, 'l'idée de frontière est extraordinairement tenace'.⁵ The defensive function of borders – or at least the public perception of it – remains in the background as a particularly appealing option, especially in times of crisis. Recent experience demonstrates that even the Schengen Area is not immune from this charm, notwithstanding the solid backbone of inter-state cooperation that characterises it. As has been widely commented upon, from 2015 the Schengen Area has faced a sharp increase in border control reintroductions, mainly in connection with the migration crisis and public order concerns connected to the terrorist threat.

This trend has been exacerbated by the COVID-19 pandemic, which prompted a wide array of reactions from the Member States, with a view to limiting the spread of the virus at domestic level. In the wake of the first outbreak of contagion, in particular, the national authorities resorted to an unprecedented wave of border control reintroductions, very often coupled with restrictions on the free movement of persons. Such unilateral hasty action resulted in uncoordinated and diversified measures, providing clear evidence of the fragility

1 Permanent Court of Arbitration, Atlantic Coast Fisheries Case (Great Britain, United States) (1910) RIAA Vol IX, 180.

2 Michel Foucher, *L'obsession des frontières* (Perrin 2012).

3 Claude Blumann, 'Les frontières de l'Union européenne. Rapport introductif général' in Claude Blumann (ed), *Les frontières de l'Union européenne* (Bruylant 2013).

4 Daniel Thym and Jonas Bornemann, 'Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics' (2020) *European Papers* 1143.

5 Daniel Bardonnnet, *Les frontières terrestres et la relativité de leur trace* (Recueil de cours de l'Académie de droit international 1976) 22.

of even longstanding achievements in the EU integration process, when confronted with pressing threats affecting the whole of the Schengen Area.

In this context, this article focuses precisely upon the reinstatement of internal border controls during the COVID-19 pandemic.⁶ Firstly, it provides a brief description of the practice of the Member States in this domain over the three main waves of contagion, between late February 2020 and early summer 2021 (Section 2). Section 3 then assesses the compatibility of the border measures enacted by the national authorities with the Schengen Border Code (SBC), in light of both the available epidemiological evidence and the requirements for border control reinstatement established by the Border Code itself. Thereafter, the analysis discusses the lessons that the pandemic has – or should have – taught to the Union and the States adhering to the Schengen acquis in relation to the governance and regulation of internal borders within the Schengen Area (Section 4). In particular, the article addresses possible reforms aimed at avoiding future uncoordinated departures from Schengen in the event of systemic crises.

2 COVID-19 and Reintroductions of Internal Border Control: The Practice of the Member States over the Three Main Waves of Contagion

The SBC envisages three derogations from the abolition of internal border controls. Article 25 governs the general framework for temporary border control reintroductions, which can be triggered in the case of foreseeable events capable of causing serious threat to public order or public security. Article 28 builds on the same justifications, but applies to unforeseen or unforeseeable events requiring immediate action. These provisions are complementary in nature and differ in relation to some of their distinctive features, such as the procedure for reinstating controls and the duration of the derogating border measures.⁷ All reintroductions enacted by the Member States in response to the COVID-19 pandemic were based upon one of these clauses. In fact, pursuant to Article 29 SBC, the last available derogation refers to risks affecting

6 Instead, the analysis does not address other measures affecting free movement of persons, such as travel bans or quarantine requirements. The reintroduction of border control does not preclude cross-border mobility, rather can impact its regular rapidity, thereby affecting also parallel aspects of the internal market, such as free movement of goods and persons.

7 For instance, prior notification of the planned reintroduction to the other Member States and to the Commission is required under Article 25 SBC, whereas pursuant to Article 28 reintroduction and notification must be simultaneous.

the overall functioning of the Schengen Area deriving specifically from serious deficiencies in the performance of external border control by one or more Member States. This simply does not apply to the health crisis in question.

Overall, the border control reinstatements related to the COVID-19 pandemic accompanied the peaks of the three main waves of contagion which struck Europe between the end of February 2020 and spring 2021, although with great differences in terms of timing, intensity, duration and territorial coverage from state to state. The national decisions on border management must be investigated in order to assess the Member States' attitude towards a borderless Europe in times of strong political pressure, while investigating the possible legal scenarios for the future of the Schengen Area.

The first outbreak of the virus in Europe, in March 2020, led to 13 states of the Schengen Area reinstalling internal border controls on the basis of a threat requiring immediate action.⁸ A further three states – namely Finland, Denmark and France – invoked the foreseeable events clause, pursuant to Article 25 SBC.⁹ Austria and Norway enacted both options in parallel, whereas Germany resorted to Article 28 SBC while maintaining its pre-existing controls under Article 25 SBC on grounds of the secondary movements of migrants and asylum seekers. Most of these temporary reintroductions covered all internal borders, with limited exceptions, such as the Czech Republic's decision to leave the borders with Poland and Slovakia untouched.¹⁰ In most cases, border controls went hand-in-hand with travel bans which strongly disrupted free movement within the Union.

The sudden collective rush to take back control over national borders led to the need for coordination attempts by the Commission and the Council. As investigated more closely in Section 4, these institutions agreed on a phased and coordinated approach to restoring freedom of movement and lifting internal border controls, with a view to returning to the ordinary situation of intra-EU mobility by mid-June 2020. Indeed, most of the Member States complied with this common strategy, even though the second and third waves of

8 For a detailed account of the relevant national practices during the first wave of the epidemic, see Sergio Carrera and Ngo Chun Luk, 'In the Name of Covid-19: An Assessment of Internal Border Controls and Travel Restrictions in the EU'. Study for the LIBE Committee of the European Parliament (Brussels 2020).

9 France and Denmark notified *in itinere* the additional corona virus justification to already ongoing controls, respectively based on persistent terrorist threat and migrants' secondary movements.

10 For the list of the reintroductions, see <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en> accessed 7 October 2021.

contagion – in autumn 2020 and winter 2021, respectively – led to two further seasons of defensive border responses. Interestingly, however, both tides of reintroductions involved fewer states, namely a maximum of ten in conjunction with the peaks of the epidemics. Moreover, in some cases – such as Belgium and Germany – COVID-19-related border measures were strictly limited in time, whereas in other situations they were connected to a shared choice of neighbouring states – e.g. Spain and Portugal – due to the specific criticalities raised by their shared internal borders. As of June 2021, controls remained in place in Finland, Norway, Denmark, Hungary and France. This is mainly due to the fact that most states decided to prioritise other restrictions on mobility, namely quarantines and pre-departure testing, as well as internal health prevention measures, such as physical distancing, mask-wearing obligation and contact tracing. This trend was confirmed more recently by the various decisions taken at national or regional level to impose the requirement of having a vaccination certificate as a precondition for travelling from other Member States.¹¹

In view of this scenario, the next section provides some reflections on the suitability of border controls as a response to the need to limit the spread of COVID-19. The first part briefly addresses the available epidemiological studies, which provide some insights for a more sound and comprehensive legal assessment. It also includes references to the guidelines issued on this topic by the competent international and European technical bodies, particularly the World Health Organisation and the European Centre for Disease Prevention and Control (ECDC). The second part investigates the national decisions in light of the formal requirements established by the SBC and their interplay with enduring scientific uncertainty. These reflections lead us to identify the lessons that we (should) have learnt from the health crisis for the future of the Schengen Area.

3 The (Un)suitability of Border Controls as Tools to Limit Contagion

3.1 *The Defensive Role of National Borders and the Spread of a Virus: Insights from Epidemiological Studies*

The legal assessment of COVID-19-related reinstatement of border controls must consider the available epidemiological evidence on the (un)suitability of these types of measures to limit contagion. Interestingly, the use of borders

11 See Iris Goldner Lang, 'EU Covid-19 Certificates: A Critical Analysis' (2021) European Journal of Risk Regulation 1.

as material limits to control the spread of epidemics is not a novelty. Historical epidemiology studies demonstrate that this strategy has actually been a regular option over the centuries, very often in close combination with other forms of mobility restrictions. As from the 16th century, for instance, precautions against plague usually entailed the establishment of patrolled military areas alongside a border. In many cases, crossing was only allowed at official points, which also served as cordon areas in which people had to quarantine.¹² However, from the middle of the 19th century, the evolution of anticontagionism and the availability of effective medical equipment and practices led to an increasing reliance on border health screenings, particularly at key international crossing points, such as ports and airports.¹³

This trend was confirmed on the outbreak of the main epidemical crises over the last three decades, in particular, severe acute respiratory syndrome (SARS), the 2009 influenza pandemic connected to the H1N1 virus and, more recently, Ebola. Systematic reviews of existing epidemiological studies reveal that entry and/or exit screenings, such as fever checks, in themselves often have limited preventative effects, particularly in terms of detecting affected patients.¹⁴ However, when combined with other individual and community disease control measures, they are worthy of consideration as a component of a comprehensive response to an epidemic. In fact, they contribute to discouraging ill persons from travelling, while keeping operational the key communication and travel routes from/to affected areas.

The key question is whether these general findings apply to the COVID-19 disease. In this respect, any evaluation of the response – medical, epidemiological or political and legal – to this global health threat should consider a preliminary aspect: SARS-CoV-2 is a new virus. Needless to say, in the wake of the initial outbreak of the pandemic, there was simply no scientific evidence at all of its characteristics or implications, including its effects on human health

12 Christian Promitzer, 'Quarantines and Geoepidemiology. The protracted sanitary relationship between the Habsburg and Ottoman Empires', in Wolfgang Göderle and Manfred Pfaffenthaler (eds) *Dynamiken der Wissensproduktion* (Transcript 2018) 23. The author refers to the remarkable example of the measures enacted at the border between the Hapsburg and the Ottoman empires, involving an area from the Adriatic Sea to Russia.

13 See the various contributions in Sevasti Trubeta, Christian Promitzer and Paul Weinding (eds) *Medicalising borders. Selection, containment and quarantine since 1800* (Manchester University Press 2021).

14 Varvara Mouchtouri et al., 'Exit and Entry Screening Practices for Infectious Diseases among Travelers at Points of Entry: Looking for Evidence on Public Health Impact' (2019) *International Journal Environmental Research on Public Health* 4638.

and the most suitable and effective therapeutic treatments.¹⁵ Understandably, it was several months before a clearer picture emerged.

Three distinctive features of COVID-19 are worthy of particular attention. Firstly, when compared to its predecessor SARS, to other types of corona virus and to the 2009 pandemic influenza, the SARS-CoV-2 appears to have, on average, a longer incubation period.¹⁶ Secondly, it has a greater incidence of asymptomatic infections. Finally, its transmission rate is higher. Therefore, although there is a high proportion of patients with mild illness, COVID-19 facilitates undetected transmission and is therefore harder to contain.

In this developing context, the technical bodies in charge of providing guidance on the most effective measures to tackle the disease took a clear stance on the suitability of border controls and travel bans. In the European scenario, on 10 February 2020, the European Centre for Disease Prevention and Control (ECDC) – an EU agency established in 2004 in Stockholm, tasked with coordinating the relevant national authorities, the processing of EU-wide data and the drafting of guidelines and best practices¹⁷ – issued its Guidelines on the use of non-pharmaceutical measures to delay and mitigate the impact of 2019-nCoV. In this document, the ECDC highlighted that, in general,

border closures may delay the introduction of the virus into a country only if they are almost complete and when they are rapidly implemented during the early phases, which is feasible only in specific contexts (e.g. for small, isolated, island nations).¹⁸

15 On 9 January 2020, the European Centre for Disease Prevention and Control (ECDC) made its first risk assessment on COVID-19 public, labelling the risk of spread within the EU from China low to very low. See, ECDC, *Pneumonia cases possibly associated with a novel corona virus in Wuhan, China* (9 January 2020) 2. In a later report of 2 March 2020, the same body pointed out that its evaluations were under the Damocle's sword of uncertainty, 'due to the many unknowns [...] regarding the virulence/pathogenicity, the mode of transmission, the reservoir and the source of infection of COVID-19'. ECDC, *Outbreak of novel coronavirus disease 2019 (COVID-19): increased transmission globally – fifth update* (2 March 2020) 4.

16 Eskild Petersen et al., 'Comparing SARS-CoV-2 with SARS-CoV and Influenza Pandemic' (2020) *The Lancet Journal of Infectious Disease* 238.

17 Considering the fact that the Union has only supporting competence in relation to the protection and improvement of human health, the ECDC's work complements and does not replace the work of national centres of disease control, with which it cooperates and which it coordinates.

18 ECDC, *Guidelines for the use of non-pharmaceutical measures to delay and mitigate the impact of 2019-nCoV* (2020) 8.

The agency consistently maintained this position even in its subsequent periodic risk assessments, at a time when some key grey areas concerning the features and effects of the virus had already been identified. In August 2020, it contended that ‘available evidence [...] does not support border closures which will cause significant secondary effects and societal and economic disruption in the EU’. Interestingly, the same wording appeared in an ECDC technical report on travel-related measures to limit the spread of the COVID-19 disease of 25 May 2020. Only in the latter document, however, did the agency point out that this specific guideline stemmed from some modelling studies developed in connection with less virulent influenza pandemics. A similar nexus can be found in the WHO international recommendations for international traffic in relation to the COVID-19 outbreak, in which the indications on border measures are essentially copied from other documents on influenza pandemics.¹⁹ Be that as it may, from September 2020, every ECDC monthly risk assessment – including those focusing on the spread of new virus variants – simply stopped referring to border measures and mobility limitations and began to pay more attention to detailed indications on traveller testing and quarantining, as well as enhanced contact tracing.²⁰

From an *ex post* perspective, these institutional guidelines appear to be in line with the outcomes of the theoretical models developed by epidemiologists on the suitability of border controls and mobility restrictions in relation to the COVID-19 threat. A review of 29 non-observational studies²¹ conducted in 2020 reveals that these measures displayed positive effects early in the outbreak, but proved to be less effective over time.²² This means that border closures – and a fortiori mere border controls – were not justified from an epidemiologic perspective with the progression of the pandemic.²³ The available analyses,

19 WHO, *Updated international recommendations for international traffic in relation to COVID-19 outbreak* (29 February 2020).

20 See for instance <<https://www.ecdc.europa.eu/sites/default/files/documents/COVID-19-risk-related-to-spread-of-new-SARS-CoV-2-variants-EU-EEA-first-update.pdf>>, at 15. See also the risk assessment of August 2020, where the ECDC discarded the relevance of border measure and travel bans, by stating that ‘measures to effectively contract-trace travellers crossing borders are needed and these should be reinforced in the coming period’.

21 Observational studies require more time and resources, but in combination with purely theoretical models will allow for clearer evidence on the real effects – if any – of measures affecting mobility.

22 Kelly Lee et al., ‘Managing Borders During Public Health Emergencies of International Concern: A Proposed Typology of Cross-border Health Measures’ (2020) *Globalization and Health* 17.

23 This position was strongly upheld by the Swedish authorities, in support of their trust-based strategy to limit the spread of the virus, once COVID-19 had already reached all

however, support the effectiveness of these measures in cases of ‘highly connected countries, or in regions with low transmission that wanted to keep the virus out’.²⁴ Lastly, the potential of these responses was reduced and their possible positive effects were neutralised if they were not combined with health checks and health prevention measures, including – as stated above – testing, contact tracing and quarantining.

Overall, therefore, the available scientific evidence and best practices suggested by the competent technical bodies generally discard the idea of a close link between border measures, travel bans and containment of an epidemic, including COVID-19. The early phases of contagion and the areas with a significantly lower rate of transmission, when compared to surrounding regions and states, however, represent an exception to this finding.

3.2 *The Compliance of Border Control Reintroductions with the Schengen Borders Code: Legal Assessment*

A discussion on the compatibility of border control reintroductions with relevant EU law requires some preliminary comments on the consistency of a border control. Article 2(10) SBC defines border control as ‘the activity carried out at a border in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration [...]’. Key components of the border control toolbox are border checks, that is to say ‘checks carried out at border crossing points, to ensure that persons [...] may be authorised to enter or leave the territory of Schengen States [...]’. This notion is further developed by Article 8 SBC with regard to external borders. In particular, this provision clarifies that border checks are, in principle, limited to surface level identity checks in cases of EU citizens and other beneficiaries of freedom of movement. On the other hand, third country nationals who do not fall into those categories are subject to thorough checks, including, amongst others, verifications of travel documents and consultation of the Visa Information System.

These clarifications also shed light on the intra-Schengen scenario, as Article 32 SBC states that, if the derogation clauses are triggered, the SBC provisions on controls at EU external borders ‘shall apply mutatis mutandis’. It follows that the nature and substance of checks at internal borders is generally in line with the description featured in Article 8 SBC. However, the Court of

the Member States: see Marta Paterlini, ‘“Closing borders is ridiculous”: The epidemiologist behind the Sweden’s controversial coronavirus strategy’ (2020) *Nature* <<https://www.nature.com/articles/d41586-020-01098-x>> accessed 7 October 2021.

24 Smriti Mallapaty, ‘What the data say about border closure and COVID spread’ (2020) *Nature* <<https://www.nature.com/articles/d41586-020-03605-6>> accessed 7 October 2021.

Justice has clarified that this does not entail an absolute juxtaposition of internal and external border regimes.²⁵ One of the reasons for the stance taken by the Court is the different overarching legal framework of internal and external border controls. Firstly, the conduct of systemic checks is the rule for external borders, while it represents an exceptional derogation to a founding pillar of the Schengen area for internal borders. Secondly, only the filter at external borders aims to tackle possible threats to public health, whereas the reintroduction of internal border control can only be justified on grounds of public policy and internal security.²⁶

These structural and textual differences are particularly significant in the health crisis at issue. First of all, regardless of any clarification of the reasons why the EU legislator upheld this clear policy decision, as a rule, public health considerations cannot form the purpose of a check within the Schengen Area. It follows that the specific provisions of Article 8 on the verification that a person crossing the external border is not 'likely to jeopardise the [...] public health of any of the Member States' do not apply to the internal dimension of the Schengen Area.

Secondly, even though no specific provisions on this matter exist in the SBC, the Practical Handbook for Border Guards – updated in 2019 by the Commission in the formal capacity of a Recommendation²⁷ – closely connects the existence of a public health threat and the ensuing necessary measures to be taken to the assessment and the decisions taken by the EU network on serious cross-border health threats established under Decision 1082/2013/EU,²⁸ its Early Warning and Response System (EWRS) and the ECDC. Therefore, national authorities should always perform the technical assessment of the public health risk for the purposes of allowing or refusing entry at the border. In the context of the COVID-19 crisis, as noted above, the international and EU competent bodies consistently removed border controls from the set of desirable national responses.

Thirdly, as the Commission emphasised in its Guidelines on border management of March 2020, 'the conduct of health checks of all persons entering the territory of Member States does not require the formal introduction

25 Case C-44/17, *Préfet des Pyrénées-Orientales v Abdelaziz Arib and Others*, EU:C:2019:220, 61–62.

26 See Articles 6(1)(e) and 26 SBC on external and internal borders respectively.

27 European Commission Recommendation C(2019) 7131 final establishing a common 'Practical Handbook for Border Guards' to be used by Member States' competent authorities when carrying out the border control of persons.

28 Decision of the Council and of the European Parliament 1082/2013/EU on serious cross-border health threats. See *infra*, Section IV.

of internal border controls'. In fact, health screenings, such as fever testing, can be performed more effectively within the territory of a Member State, provided that appropriate coordination with neighbouring states is secured, so as to avoid unnecessary duplications of health prevention measures (in any case, the inherent features of COVID-19 outlined above, such as the high incidence of asymptomatic cases, makes this kind of screening potentially futile).

Lastly, other kinds of health prevention measures, such as the obligation to quarantine upon arrival or to have a vaccination certificate or a negative test prior to departure, simply do not fit the definition of border controls or checks. Rather, they constitute limitations to the EU law on free movement and must be assessed in the light of the relevant legal framework, which runs parallel to the SBC rules on border control reintroductions.

Overall, these considerations lead to the argument that internal borders checks are, in principle, neither suitable nor necessary to tackle the health threat at issue, due to both the features of COVID-19 and the formal limits of the notion of border check. However, the unprecedented characteristics of the events that have occurred over the last eighteen months should not be underestimated. In this respect, it should be noted that the possibility of reinstating border control does not amount to a *carte blanche*: in addition to complying with the relevant procedural requirements established by the SBC, national authorities must ensure respect of the principles of necessity and proportionality.²⁹ They are duty bound to indicate the reasons for their decisions and to demonstrate their suitability to the aim pursued, the absence of any feasible, less intrusive alternatives and the lack of any excessively disrupting consequences. On the one hand, this means that the territorial scope and duration of the derogations to the SBC must be carefully considered, in light of an individual assessment and the specific public order or internal security threats faced by a Member State. On the other hand, any decisions by Member States to invoke Article 25 or 28 SBC are unilateral and there is very limited room for *ex ante* remedies for the other Member States and the Commission.

Therefore, the design of the SBC derogatory clauses may turn out to be a powerful boost for national centrifugal ambitions. The same applies to the proportionality assessment, which may very well encompass broader policy considerations on the possible risks connected to a given crisis. The room for political decision-making is understandably wide where the concerns stemming from the many grey areas surrounding a worldwide health crisis are

29 See Article 26 SBC.

amplified by the absence of reliable scientific knowledge,³⁰ or evidence on the virus. In short, in such circumstances, it would be misleading to depict the reintroduction of border control as a solely technocratic decision. Particularly in the aftermath of the first outbreak of the epidemic, the management of internal and external borders was conceivably perceived as an integral component of a broader balance between the conflicting interests shared by both the Union and the Member States, namely the protection of health and the avoidance of excessively negative societal consequences deriving from containment measures. In line with this consideration, the Joint Roadmap towards lifting COVID-19 containment measures issued by the Commission and the European Council in April stressed that the national authorities were to give primary importance to the protection of public health in the short and long-term, but also acknowledged that ‘the decision to end restrictive measures is a multidimensional policy decision, involving balancing public health benefits against other social and economic impacts’.³¹

From this point of view, the collective risks deriving from the rapid spread of a new virus arguably overcome the boundaries of a solely public health threat. As the epidemic affects the social and economic life of a community and even imposes obstacles to the regular functioning of key public services, the dividing line between the formal public health derogation and the public policy and public security clauses becomes blurred, leaving greater room for manoeuvre for the Member States. In fact, the Court of Justice has consistently described public policy concerns as the ‘existence [...] of a genuine and sufficiently serious threat [...] affecting one of the fundamental interests of

30 See Jorrit Rijpma, ‘COVID-19, another blow to Schengen?’, (2020) *Maastricht Journal of European and Comparative Law* 548.

31 European Commission and European Council, ‘Joint Roadmap towards lifting COVID-19 containment measures’ <https://ec.europa.eu/info/sites/default/files/communication_-_a_european_roadmap_to_lifting_coronavirus_containment_measures_0.pdf> accessed 7 October 2021. In a similar way, the guidelines issued by the ECDC and the WHO make direct reference to the fact that the (non)-desirability of defensive reactions limiting mobility should be measured against their economic and societal impact. WHO, ‘Updated WHO recommendations for international traffic in relation to COVID-19 outbreak’ (2020) <<https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak>> accessed 7 October 2021.

a society',³² whereas public security can be invoked, *inter alia*, where critical situations can disrupt the provision of essential services.³³

The pandemic itself and the measures to tackle it have evidently spilled-over from a health emergency *per se* to a situation affecting key economic interests, social cohesion, labour market resilience, public budgets, and the daily enjoyment of collective life by families and communities. It has also put under severe pressure the functioning of healthcare systems, including care for non-COVID-19 patients, and has led to unprecedented blocks on essential services, such as education and transport. These elements reasonably fit the definitions of public policy and public security developed by case law. Accordingly, the possibility of making justified recourse to the SBC derogation clauses was confirmed by the Commission itself, in its first Guidelines on border management measures, where it contended that '[i]n an extremely critical situation, a Member State can identify a need to reintroduce border controls as a reaction to the risk posed by a contagious disease'.³⁴

In March 2020, regardless of the hectic and uncoordinated way in which these measures had been implemented, the limited information available on the virus and its material effects on societal life provided sound support to the Member States' will to take back control of their borders. Even though this practice turned out to be more politically symbolic than effective or successful from the perspective of health protection, it is difficult to argue – from an *ex post* perspective – against the national authorities' decisions to reinstate border controls at the very outset of the COVID-19 pandemic.³⁵

At the same time, crucially, in a situation such as this, the burden of proof as to the suitability, necessity and proportionality of the reintroduction of border control evolves – and probably becomes more imposing – over time. In fact, the lifting of the original veil of ignorance over the virus and the gradual obtaining of scientific evidence have allowed both the competent technical bodies and the political authorities at national and EU level to acquire awareness and develop guidance on the most effective non-therapeutic responses to

32 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. Case C-348/09, *P.T.*, EU:C:2012:300, 22.

33 See for instance Case 72/83, *Campus Oil*, EU:C:1984:256, 34.

34 European Commission (2020), Guidelines for border management measures to protect health and ensure the availability of goods and essential services COM(2020) 1753, para 18.

35 Stefano Montaldo, 'The COVID-19 Emergency and the Reintroduction of Internal Border Controls in the Schengen Area: Never Let a Serious Crisis Go to Waste' (2020) European Papers 523.

the epidemic. In this respect, as outlined above, the key finding is that border checks are simply unfit for purpose. It follows that the Member States' decisions to reiterate this practice during the second and third peaks of contagion are much more open to criticism. Admittedly, the criteria laid down in the SBC require an individual assessment, in light of the circumstances occurring at each border area, and therefore a generalised criticism should be avoided. However, the disputed compatibility with the SBC is worthy of closer scrutiny, in those cases – such as France for instance – where reintroductions have continued without interruption since the beginning of the health crisis and have covered all national internal borders. However, an *ex post* complaint in the context of an infringement procedure³⁶ or litigation before the domestic courts³⁷ appears to be at the very least unlikely.

4 The Lessons We (Should) Have Learnt and the Future of the Schengen Area

4.1 *Public Health Concerns and Border Control Reintroductions*

Notwithstanding the blurred contours of the scope of public health, public policy and public security derogations in extremely critical situations, the absence of an explicit reference to public health for the purposes of managing internal borders requires additional considerations. In particular, the practice of several Member States invokes some reflections on – firstly – whether a formal inclusion of this clause in the SBC as a basis for reinstating internal border control would be advisable. Secondly, the possibility and desirability of smoother coordination between the SBC and EU secondary legislation dealing with cross-border health emergencies is worthy of a brief discussion.

It is crucial initially to note that public health is a multifaceted concept, which requires a delicate and continuous attempt to reconcile (potentially) opposing driving forces. It lies at the core of a segmented vertical division of competences between the European Union and its Member States, where a tendency to creep towards EU competence – arguably reinforced by the

36 Such an option has remained unexploited so far, due to the reticent behaviour of the Commission, as discussed by Marie De Somer, 'Schengen: Quo Vadis?' (2020) *European Journal of Migration and Law* 178, 185.

37 Following an action brought before a national court, a reference for a preliminary ruling was made with a view to get clarifications from the Court of Justice as to the maximum duration of internal border controls and to the possibility to shift from one legal basis to another: see the pending case C-368/20.

pandemic³⁸ – faces major national *domaines réservés*.³⁹ At the same time, it constitutes a priority of some EU policies and actions and a derogation from EU law. Lastly, its collective dimension must be reconciled with the individual right to health. National priorities may clash with attempts to develop a common approach at European level, just as the societal scope of health risks may collide with individual expectations of protection. The extent to which these components of the spectrum of health protection can be harmoniously balanced is a matter of political decision-making and the ensuing normative choices, along with the margin for balancing exercises in specific situations which the application of formal rules may allow.

Article 2(21) SBC describes a threat to public health as ‘any disease with an epidemic potential’ as defined by the WHO ‘and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the Member States’. Provided that these conditions are met, any person detected at an external border crossing point who constitutes a risk to collective health within the Schengen Area may be refused access to the Area itself, except, for instance, where the urgent need for a lifesaving medical treatment sees the fundamental right to life and health prevail. It is the individual source of the potential threat at issue that reasonably explains why no references to public health considerations were included in the SBC also for internal borders. Since the abolition of internal border control is a founding pillar of Schengen – also being a symbol of Schengen itself and of an increasingly united Europe⁴⁰ – the persons drafting the Code were concerned with limiting departures from it to exceptional situations requiring action.

Although their actual scope is far from clear and may also vary from state to state, the notions of public policy and public security developed by the Court of Justice have set the bar for reintroducing border control definitely at a high level. Yet, as argued in the previous paragraph, these clauses are not immune to threats stemming from a health crisis. If the required standard of seriousness and magnitude of a given risk is met, public health emergencies can lead to the application of public policy and public security clauses. The Schengen Area is given protection, while the Member States are not offered leeway to depart very easily from the abolition of internal border control. At the same time, the Member States are not left entirely unprotected, as the same definition

38 Alberto Alemanno, ‘The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination?’ (2020) *European Journal of Risk Regulation* 307.

39 Flavia Rolando, ‘La tutela della salute nel diritto dell’Unione europea e la risposta all’emergenza Covid-19’ (2021) 1.

40 Ruben Zaiotti, *Culture of Border Controls. Schengen and the Evolution of European Frontiers* (Chicago University Press 2011) 67 ff.

of public health threat set out in the SBC features in Article 29(1) of Directive 2004/38, which allows for possible restrictions to be applied to the free movement of persons. This provision has been at the core of many of the mobility restrictions enacted by the Member States since March 2020.⁴¹

Such considerations demonstrate that a reform of the SBC to include public health threats among the grounds for reinstating border control is neither desirable nor useful for determining the limits of national managerial ambitions over internal borders.

At the same time, the COVID-19 crisis has taught us another lesson regarding the difficult interplay between scientific health risk assessment and political decision-making. Back in 1999, in a Communication concerning the most critical aspects of the implementation of EU secondary legislation on free movement of persons in force at the time,⁴² the Commission highlighted that ‘the public health grounds are somewhat outdated given the current level of integration of the European Union and the development of new means to handle public health problems’. Evidently, the statement did not address the possibility of facing health threats per se, but did put forward the idea of endowing the Community and the Member States with more forward-looking instruments to cope with risks displaying possible cross-border implications rather than reiterating the recurring freedom/derogation dynamic.

The pandemic has revealed that this is still an unresolved issue, even though the mechanisms of inter-State cooperation in cases of health crises have evolved sharply since the late Nineties. In particular, the Lisbon Treaty empowered the EU public health policy, by allowing the Parliament and the Council to promote ‘measures concerning monitoring, early warning of and combating serious cross-border threats to health’, pursuant to Article 168(5), TFEU. Building on this new legal basis, the EU legislators adopted Decision 1082/2013/EU on serious cross-border threats to health, repealing a pre-existing Decision of 1998. This act lays down rules on epidemiological surveillance, monitoring and early warning of threats to health, with a view to supporting coordination and cooperation between the Member States and improving the prevention and control of the cross-border spread of serious human diseases. In the framework of a wide set of measures, the Decision established a Community network on epidemiological surveillance, operated by the ECDC, and an Early

41 For a discussion on these aspects see Iris Goldner Lang (n 11).

42 European Commission (1999), Communication from the Commission to the Council and the European Parliament on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health, COM(1999) 372.

Warning and Response System (EWRS), tasked with issuing rapid alerts on serious cross-border health threats. According to this crisis management system, when a risk is notified by the EWRS, the ECDC – or other competent EU agencies, such as the European Food Safety Authority, depending on the source of the threat – is required to conduct and update on a regular basis a public health risk assessment. As we have seen already in relation to the ECDC assessments on the COVID-19 pandemic, these evaluations include guidance on the most suitable public health measures. Moreover, in accordance with Article 11, the Member States have a duty to coordinate their national responses. In particular, they must consult and inform each other and the Commission on the nature, purpose and scope of the measures they are about to enact.

Notwithstanding the close substantial connection between the management of EU borders and the development of a coherent EU approach to cross-border health threats, the SBC does not include any references to Decision 1082/2013 and to the efforts for a smoother multilevel and horizontal coordination of responses to health risks. The Commission Practical Handbook for Border Guards *de facto* confirms this link, as it urges the competent national authorities to perform their tasks at the Schengen external borders in accordance with the guidance developed by the EWRS and the ECDC. However, these indications are anything but conclusive. The nature of this document is somewhat soft as it does not impose clear obligations on the competent national authorities. In addition, the Handbook focuses only on individual checks on persons at external borders, while it does not cover broader policy strategies on national responses to a given health threat.

As the reactions to the COVID-19 pandemic have demonstrated, technical bodies endowed with coordination tasks in the framework of the health emergency have repeatedly addressed the issue of border control reintroduction and mobility restrictions. On the contrary, the choices made by most of the Member States in this domain were entirely uncoordinated, if not even in plain contrast with the technical guidelines. The failure to connect these two parallel branches of EU law advocates for a possible improvement of the SBC. This could come in two different forms, which are not mutually exclusive and could therefore be combined. Firstly, a new general clause explicitly referring to the duties of mutual coordination and information between Member States established by Decision 1082/2013. This could be worded as a compulsory procedural pre-condition to trigger the SBC derogation provisions on border control reintroductions. Secondly, a provision calling for detailed clarifications from the national authorities as to the compliance of their will to reinstate border control with the indications provided by competent technical bodies. It could be argued that such an obligation already exists, as insights from the competent

agencies could contribute to upholding or discarding the Member States' justifications for departing from the abolition of border control.⁴³ However, the leeway offered to the Member States thus far by the reticent approach of the Commission and the paramount importance of political decision-making in the adoption of these border measures requires an exercise in realism.

The absence of a formal requirement fuels national centrifugal forces and deprives the Commission, the other Member States and EU citizens of solid normative support. Such a reform would therefore require the Member States to state more clearly reasons for their choices and would provide further substance to the assessment on the suitability, necessity and proportionality of the national measures. Moreover, such a reform could also ensure greater coherence of EU policies and Member States' approaches to the interplay between the management of health threats and the SBC.⁴⁴ These reforms could foster coordination at the very initial stage of a crisis and would be even more useful over time, when sudden political reactions arguably leave greater room for technical considerations.

4.2 *From Formal Requirements to Soft Coordination?*

The defensive use of borders applied by many Member States during the pandemic echoes similar national attitudes vis-à-vis the migration crisis that Europe has been facing over the last ten years. Six states of the Schengen Area – namely Austria, Denmark, France, Germany, Sweden and Norway – have continued to conduct border controls since 2015, following the pressure on the Dublin system and the ensuing mass flows of migrants and asylum seekers. In particular, these Member States have managed to justify their border controls by shifting from one SBC legal basis to another, whenever the respective maximum period expired. They also based their notifications on slightly different justifications, to further secure continuity of (temporary) reintroductions over the months and years. In this respect, the justifications in question often fall short of demonstrating the necessity and proportionality of border controls. For instance, despite official statistics revealing 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 EU external borders.

43 Federico Casolari, 'Prime considerazioni sull'azione dell'Unione ai tempi del Coronavirus' (2020) *Eurojus* 1, 10.

44 In a similar way, De Somer advocates in favour of a closer coordination between the SBC and the rules governing the Common European Asylum System. See Marie De Somer (n 36) 192–194.

In this framework, despite the widespread criticism, EU institutions have thus far failed to challenge this practice. The European Parliament has repeatedly and unsuccessfully raised concerns as to the lawfulness of this situation, whereas the Commission has been entirely reticent. It has never complained about the situation or called for an end to the enduring border controls, through its monitoring tasks within the Schengen Evaluation System or by starting an infringement procedure. Moreover, it has proposed a controversial reform of the SBC, characterised, in particular, by extending the period for reintroducing border controls under Articles 25 and 29 SBC and by more stringent preliminary obligations on national authorities to justify reinstatements, such as the drafting of a risk assessment.

The European Parliament reacted harshly to the proposed reform. The rapporteur complained 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”. Following some inconclusive inter-institutional negotiations, the proposal was left in limbo between the Council’s desire to gain greater flexibility in favour of the Member States and the Parliament’s quest for closer monitoring and stricter criteria. Notwithstanding the parliamentary ambition to renew this proposal after the 2019 European elections and the establishment of the new European Commission, it has in fact been abandoned.

Nevertheless, the attitude of the European Commission, the failure of the legislative procedure and the practice of the Member States in relation to both migration and the COVID-19 crises speak volumes about the feasibility of solely technical solutions to the enduring loopholes of the SBC. Notwithstanding the normative pre-determination of substantive and procedural requirements to trigger border control clauses, formal rules display limited capacity to govern the system. On the one hand, many Member States are primarily concerned with the collective perception of security linked to taking back control over national borders. Regardless of the level of stringency of the criteria for reinstating controls, these have thus far failed to influence significantly the conduct of domestic authorities. In short, the implementation of the SBC is much more dependent on political goodwill than on respect of the duty to comply with obligations stemming from EU law. On the other hand, from the viewpoint of the European institutions, the supervision of the conduct of national authorities has not provided effective solutions to the enduring departures from Schengen, while the mechanisms for the enforcement of EU law have been left unexplored.

In the current context, a re-definition of the requirements established by the SBC – such as the duration of reintroductions or the intensity of the duty

to state reasons – is certainly worthy of appreciation in theory. However, its actual impact would be questionable, unless these reforms were focused on the necessary coordination with other branches of EU law – as discussed in the previous paragraph in relation to EU action in the management of health emergencies – or if they were accompanied by an institutional paradigm shift by the Commission.

However, frustrating these considerations might be from a legal perspective, they pave the way for another possible scenario. The COVID-19 stress-test, particularly in the aftermath of the initial outbreak of the pandemic, has provided clear evidence of how the unilateral nature of decisions to reinstate control and the high incidence of political decision-making is not effectively counter-balanced by remedial mechanisms intended to secure closer coordination. Faced with an unprecedented health crisis, the Schengen Area states have prioritised purely national responses, even though a highly infectious virus such as COVID-19 easily crosses material borders and instead required a coherent and agreed reaction. However, the SBC does not provide for a Schengen-wide system of coordination in the event of collective threats affecting public policy or public security pursuant to Articles 25 and 28.⁴⁵ Consultations with other Member States and the Commission take place only once a decision to reintroduce control is taken and are in any event held at bilateral level.

In this framework, again regardless of the formal rules of the SBC, the Commission and the states have explored spontaneous ways to accommodate this normative gap. On its part, since the very beginning of the emergency, the Commission has taken a coordination role, by issuing guidelines and other non-legally binding acts addressed to all states of the Schengen Area. Building on the paramount objectives of safeguarding the internal market and public health, the Commission produced a comprehensive set of best practices concerning border measures and intra-EU mobility, such as the arrangement of green lines at official crossing points to facilitate the movement of essential goods, including medical equipment. It also urged the Member States to avoid imposing excessive burdens on the mobility of key selected categories of workers, such as frontier, posted and seasonal employees, as well as health-care workers. In addition, the guardian of the Treaties played an active role in defining a strategy for the gradual lifting of border controls and other mobility restrictions within the Schengen Area.

These documents contributed to the flourishing production of soft law during the pandemic. Aside from the general advantages usually attached to

45 The situation is different for Article 29, where the decision-making power is primarily granted to the Commission and the Council.

these kinds of acts – namely their flexibility and rapidity of adoption, which are particularly appealing in times of crisis – the Commission guidelines are meritorious on two grounds. Firstly, they allowed the Union to mobilise swiftly, notwithstanding the obstacles introduced by the pandemic, with a view to exploring all means reasonably available in times of emergency to achieve greater coordination between the Member States. Secondly, they also allowed the Commission to overcome the initial resolute lack of cooperation from national authorities and to achieve greater convergence in terms of restrictions on intra-EU mobility and their gradual removal.

In addition, this institutional strategy to accommodate uncoordinated national responses was soon flanked by a more traditional intergovernmental approach to the challenges posed by the pandemic. For instance, some blocs of states took the decision to establish mini-Schengen areas⁴⁶ or ‘travel bubbles’,⁴⁷ based on political goodwill and shared objectives. These initiatives replicated the inherent features of Schengen, namely a borderless internal dimension safeguarded by the conduct of systematic checks at borders with the outside world. Having acknowledged the risks of an exacerbated fragmentation of the Schengen Area, the Council soon became the main forum of reconciliation for diverging domestic responses. In fact, the Council established an exit strategy to abolish the first wave of border control reintroductions and the Commission eventually decided to uphold this plan, by signing a Joint Roadmap Towards Lifting COVID-19 Containment Measures.⁴⁸ Soon after, in the wake of the second peak of contagion, the representatives of the states managed to reach an agreement on shared criteria for triggering mobility restrictions within the Schengen Area and in relation to third countries. A Council Recommendation launched a classification system of the health risk in each state, based on a combination of three rates: the number of newly notified cases per 100,000 people in the last 14 days, the number of tests carried out in the last week and the percentage of positive tests. Interestingly, the recommendations are updated on a regular basis in light of the data and technical information provided by the ECDC. They do not impose legal obligations, but are intended to assist decision-making processes at national level. However, they have contributed to securing greater coordination during the subsequent phases of the epidemic. From a broader perspective, the initiatives taken by the Council and

46 This formula was used on several occasions in 2015–2016, during the refugee crisis, by the then Dutch Minister for Foreign Affairs Jeroen Dijsselbloem.

47 This happened for instance with the Baltic States on 15 May 2020. Reuters, ‘Baltics open Europe’s first pandemic “travel bubble” as curbs ease’ <<https://www.reuters.com/article/us-health-coronavirus-baltic-idUSKBN22Q3KM>> accessed 7 October 2021.

48 Joint European Roadmap (n 31).

their impact demonstrate how the Schengen Area still today depends strongly on political commitment.

Bearing in mind this scenario – and provided that the combination of informal reactions from the Commission and the Council has managed to calm the turbulence of the Schengen Area – the question remains as to whether the COVID-19 experience could lead to normative changes in relation to the governance of border reintroductions.

The possibility of endowing the Commission with a formal coordination role over border control reintroductions – either in general or in situations affecting a significant number of states – does not appear to be feasible. The origins and development of Schengen itself followed a clear intergovernmental footprint, the inheritance of which still remains between the lines of the legal regime for the management of internal and external borders. In fact, at the time of the Communitarisation of the Schengen *acquis*, the Commission made an attempt to position the SBC derogation clauses under its control. The Member States resolutely rejected this option and the EU executive had to settle for the normative description of these clauses as last resort options, under the full decision-making discretion of the national authorities. Years later, from 2011, a similar issue was at the core of the negotiations for the reform of the SBC following the Arab springs and the Syrian crisis. At the time, the Commission again tried to gain control over the new reason for departing from the abolition of internal border control in cases of persistent serious deficiencies at external borders affecting the overall internal dimension of the Schengen Area.⁴⁹ However, inter-institutional negotiations saw the Member States retain the last word on the mechanism, which is conditional upon the issuance of Council recommendations, building on a previous proposal from the Commission.

Any step towards improving the current wording of the SBC should seriously consider this background. Accordingly, the Code could be supplemented with the introduction of a general mechanism governing border control reintroductions in cases of crises affecting – entirely or partly – the Schengen Area or involving interests common to all States of the Area itself. This clause could replicate the institutional chain enshrined in Article 29 SBC, where each State, the Commission and the Council contribute to providing a coordinated response. From a substantive point of view, the provision could be devoted specifically to health risks. However, the absence of a direct reference to a

49 European Commission (2020), Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions on Migration COM(2010) 248, 9.

predetermined kind of threat would ensure it was flexible enough to be used in any case of a crisis of such magnitude as to cause uncoordinated reactions from the national authorities. This could be done either by including a new article within the SBC or by rewording Article 29, where a clause concerning systemic crises in general could then be followed by specific provisions on the close interplay between external and internal borders. This reform would not result in additional Schengen-related obligations, which – as outlined above – the Member States have often proven to be keen to depart from over the past years. It would rather reserve the management of the most pressing crises to an interinstitutional mechanism in which the Member States cannot take sudden unilateral action and are urged to take the systemic dimension of the Schengen area into due consideration. Actually, although limited, the existing experience on the implementation of Article 29 SBC shows a high degree of compliance with the limits enshrined therein and a subsequent rush on the part of the national authorities to take back control under Articles 25 and 28 SBC once the prorogations of the systemic crisis clause had expired.

In addition, a further reference to the importance of aligning the Commission's proposal and the Council's recommendation with the indications provided by EU specialised bodies – such as the ECDC for health issues or Europol for public order matters – would orient policy-making without depriving the states of reasonable room for manoeuvre. This general provision addressing Schengen-wide critical situations could also complement the clauses proposed in the preceding paragraph in relation to health threats in particular.

Aside from cases of exceptional systemic turbulence, such as the current health threat, the proposed mechanism could be particularly beneficial in situations where a certain number of states introduce border control on similar grounds and/or repeatedly extend the duration of such a measure. In these circumstances, the obligation to carry out inter-institutional negotiations – even at the request of just one Member State, as envisaged by the current Article 29 SBC – would require cooperation on the part of the states and facilitate the production of a shared solution via political commitment, without necessarily waiting for the Commission to commence infringement proceedings.

Crucially, the proposed clause could be suited to the enduring internal border controls enacted uninterruptedly by Austria, Denmark, France, Germany, Sweden and Norway since 2015, in relation to which the solutions outlined thus far by the Commission and the Parliament have proven to be unsatisfactory. For instance, numerous pleas have been made to replace these controls with ordinary police checks within the national territory. These police activities are

permitted by Article 23 SBC insofar as they do not amount to having an equivalent effect to the reinstatement of border control, and have their Treaty basis in Article 72 TFEU.

Interestingly, the EU institutional narrative in relation to this option has evolved remarkably in recent years. Originally, ordinary police controls, especially when carried out near border areas, were described as activities to be treated with caution, due to the high risk of a *de facto* evasion of the ban on internal border control. However, the lack of effectiveness of the formal toolkit to safeguard the internal dimension of Schengen gradually led to a paradigm shift, whereby the Commission depicts ordinary police checks as a desirable alternative – or even ‘the’ desirable alternative – to any use of the SBC derogation clauses. Even though the Court of Justice has consistently listed the requirements of such a police check in order to comply with the SBC, these practices often lack transparency and are beyond the scope of the Commission’s supervision.

Although recent case law has clarified that Article 72 TFEU does not relate to the vertical division of competences between the EU and the Member States and that the national authorities must comply with the general principles of EU law when invoking this Treaty provision,⁵⁰ the idea of a return to a fully-fledged Schengen Area only by means of enhanced domestic police checks near border areas cannot be accepted. The envisaged inter-institutional mechanism would at least complement this strong reliance on the exercise of police powers and offer an easily accessible – and also already tested – solution at EU level to recomposing the national centrifugal forces.

5 Conclusions

The European Union and the Schengen Area have been described as a remarkable geopolitical exception, being lauded with the unparalleled merit of having dismantled the traditional defensive functionality of borders-barriers, at least between the participating states.⁵¹ However, notwithstanding the achievements of the integration process and the increasingly more profound level of cooperation between the Member States, the COVID-19 epidemic has revealed that internal borders are still imbued with political symbolism. The

⁵⁰ See for instance Case C-808/18 *Commission v. Hungary*, EU:C:2020:1029.

⁵¹ ‘L’Union, qui s’est ingénie à réduire le fonction de barrière des frontières, constitue une exception géopolitique remarquable dans le monde’. Olivier Descamps, ‘La formation historique des frontières européennes’, in Claude Blumann (n 3) 195.

possibility of taking back control over a border is still perceived as an accessible safe haven, just as – from the opposite perspective – the abolition of border control constitutes an emblem of the self-image that the European Union longs to display to its citizens, to the Member States and to the outside world.

Internal borders continue to convey complex dynamics of multilevel power, trust and cooperation which the current legal framework and political governance of the Schengen Area have failed to address effectively. Firstly, the Commission's persistent reluctance to deploy its evaluation, oversight and enforcement roles in full frustrates the formal requirements for border control reinstatements. The Member States often do not fully comply with their duty to state the reasons for border control reintroductions and to provide solid arguments to demonstrate their suitability for the pursued purposes, their necessity and their proportionality. Even if they fail to comply, neither the Schengen evaluation system nor the Commission's enforcement toolkit currently represent reasonably effective remedies. The pandemic has confirmed this loophole, where the conduct of most Member States was in plain asymmetry with the technical guidelines of the ECDC.

Secondly, COVID-19 marked a sudden resurgence of intergovernmentalism as the real driver of EU border management. Aside from broader considerations on the overall governance of the Schengen Area and on the leeway offered to the diverging political priorities of the Member States, the reliance on political goodwill sheds light on the current failure of the Lisbon ambition of a truly European border policy enshrined in Title V – Chapter 2 TFEU. When confronted with the health crisis – not only in the reasonably complex aftermath of its initial outbreak – the Schengen Area simply lacked the proper means to tackle the challenge and fell back to pre-Lisbon intergovernmental schemes.

The combination of these two factors highlights the risk to the future of the Schengen Area and identifies a need for normative improvements. The risk refers to the manifest failure of legal rules to regulate departures from the abolition of internal border control. Since Articles 25 and 28 SBC design reintroduction clauses as unilateral decisions, an increasing and uncontrolled margin of manoeuvre in the hands of the Member States would simply neutralise the structural checks and balances on which it is based, also entailing possible further negative implications for the internal market. Moreover, the lack of an effective filter by the Commission increases the absence of transparency on national measures and decision-making, thereby affecting the accountability of the internal border management system.

As discussed in this article, the need for normative improvements encompasses reforms aiming to strengthen the role of technical bodies in cases of

crises involving complex scientific issues, as well as the inclusion in the SBC of a general systemic crises clause, establishing an inter-institutional and multi-level procedure for border control reinstatement similar to the one codified in Article 29 SBC. Even though the soft coordination approach taken by the Commission and the Council in spring 2020 has led to increased coordination of national measures, the complex and evolving political dynamics underpinning the Schengen Area call for legal certainty in order for the Area to survive in the long run.

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