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The Future of Schengen

Internal Border Controls as a Growing Challenge to the EU and the Nordics

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The free movement of people is considered one of the key achievements of the European Union. Even though the Schengen Agreement has survived the most difficult phase of the refugee crisis, it is now under threat again. It is no longer possible to reconcile temporary internal border controls that Germany, France, Austria, Sweden, Denmark and Norway introduced in 2015 with the stipulated deadlines and procedures of the Schengen regulation. The common European regime is increasingly at risk due to concerns over narrow domestic policies or that individual countries, in particular Denmark, will exit. Such a potential break would be drastic, especially for the Nordic states where the principle of open internal borders has previously been practiced for decades, but whose recent controls have so far received less attention in the European debate. A compromise is, therefore, urgently required to fully restore the free movement of people in the Schengen area whilst, at the same time, taking greater account of the security interests of the member states. As the main trigger for border controls, Germany has a key role to play here.

During the height of the refugee crisis between autumn 2015 and spring 2016, six Schengen member states introduced controls at some of their internal European borders. Germany began on 13 September 2015 with controls at its border with Austria in order to better record the influx of people seeking protection. A few days later, Austria followed suit on its southern border and introduced measures to control the 'Balkan Route'. Other main destination countries for asylum seekers included Sweden, Denmark and Norway and, in November 2015, they took similar steps to monitor the most important land, bridge and ferry links with each other and towards Germany.

This sharply contradicted the principle of a borderless North, not least as these actions were hardly coordinated with each other. Meanwhile, France was forced to declare a national state of emergency due to the terrorist attacks of 13 November 2015. Paris also reintroduced border controls because several members of the terrorist cell had previously moved freely throughout Europe. At the end of 2015, a Schengen evaluation conducted by the EU Commission confirmed that there were severe systemic failures in Greece's external border controls. This led to discussions whether to suspend Greece as a full member of the Schengen zone. To avert this step, the Council decided



in May 2016 to allow internal border controls as a compensatory measure.

This mechanism was only set up in 2013 in response to a previous Schengen regime crisis triggered by the Arab Spring. In 2011, large numbers of North African nationals were entering Italy and travelling further into the EU. In response, France set up unilateral border controls to Italy, which firmly protested against this measure. Only after two years of negotiations did the EU find a compromise to this confrontation. According to the recently introduced Article 29 of the Schengen Code, internal border controls can only be maintained for more than six months and up to two years if the EU Council of Ministers recognises, by a qualified majority, that there is a systematic threat to the entire Schengen zone. Such a decision was taken for the first time in May 2016 with respect to the situation in Greece and was subsequently used by Germany, Austria, Denmark, Sweden and Norway.

France, on the other hand, took a different path and extended its border controls by referencing the continuing terrorist threat. To achieve this, French authorities repeatedly invoked Article 25 of the Schengen regulation which grants internal border controls for reasons of national security for up to six months. Given the renewed, serious terrorist attacks in Brussels on 22 March 2016, this interpretation of the Schengen regulation and consecutive use of legal time limits was not openly criticised. Rather, the EU Council of Ministers pushed for additional security measures, in particular for obligatory and IT-supported checks on all persons crossing external Schengen borders.

At the time, decision-makers were driven by the fear that the Schengen area could break up completely. The trade and welfare losses associated with the reintroduction of comprehensive internal border controls were estimated to be at least 0.15 percent of EU gross national product or 63 billion euros per year. However, the fences erected on Hungary's and Slovenia's external Schengen borders — as well as a section of Austria's internal border — were a particularly drastic illustration of the impact such a devel-

opment could have. The free movement of European citizens is generally considered the EU's greatest achievement. And even after the closure of the Balkan Route and the agreement with Turkey in the spring of 2016 marked a reversal in irregular immigration, the Brexit referendum in June of that year underlined the profound damage that the temporary loss of control at external borders had done to the legitimacy of the EU. Against this background, the prolonged internal border controls enforced by six Schengen member states were seen as a necessary and proportionate response.

In addition, the six states minimised or gradually adjusted the scope of these control measures. While Germany only monitored a small number of border crossings with Austria, in May 2017, for example, the Swedish government decided to switch from systematic identity checks on all persons crossing the border from Denmark to Sweden to only random checks on train passengers. This significantly relieved pressure on the cross-border economy and the numerous commuters in the greater Copenhagen-Malmö area. At the same time, new technical systems enabled additional security controls without major traffic disruptions. Spurred on by the Stockholm terrorist attack in April 2017, automatic license plates scanners and X-ray cameras were installed to monitor the traffic across the Øresund Bridge.

Smouldering crisis since autumn 2017

However, the European Commission recommended at the time that all remaining stationary internal border controls should be phased out by winter 2017. Although irregular immigration via Libya to Italy did increase, it could no longer be argued that this was a serious systemic risk to the Schengen zone. Most irregular migrants were rescued from ships in distress by European vessels and registered in EU hotspots, in contrast to the peak of the migration crisis in 2015. Moreover, by November 2017, extending border controls for a fourth time

would no longer legally be permissible under Article 29 of the Schengen Code. As a compromise, the Commission suggested the possibility of intensifying police controls in border areas. Finally, the French government also lifted its national state of emergency in November 2017, which, until then, had legitimated its consecutively prolonged border controls for reasons of national security.

Nevertheless, none of the six Schengen states concerned was willing to follow the Commission recommendation and reinstate the full freedom of movement. Instead they proposed – without Sweden – to extend the maximum permissible duration of temporary border controls under Article 29 from two to four years. However, neither this initiative nor a compromise proposal by the Commission (three years) found enough political support among the other Schengen members. In response, Germany, Austria, Denmark, Sweden and Norway moved from Article 29 to Article 25 of the Schengen Code in an attempt to legalise the maintenance of internal border control measures beyond November 2017. By doing so, they were following the precedent set by France and emphasised that the threat of international terrorism remained very high. In practice, however, border checks continued to focus on irregular or secondary migration.

The gap between applicable EU law and political debates in the Schengen member states concerned has grown further since then. The Berlin Coalition Agreement of March 2018, for instance, states that internal border controls are justifiable until the EU's external borders provide effective protection. Accordingly, Germany has already prolonged its border checks twice for six months until May 2019. Yet the wording in the German coalition agreement and the parallel maintenance of controls by all six states concerned is increasingly at odds with the Schengen regulation, which defines internal border controls as a temporary measure of last resort. Meanwhile, the bitter domestic confrontation in summer 2018 over push-backs of previously registered asylum seekers at the German-Austrian border focused almost exclusively

on the provisions of the Dublin regulation. Yet if one considers the time limits stipulated by the Schengen regulation, the new bilateral agreements on the speedy return of asylum seekers that are caught at the German-Austrian border to Spain, Greece and – possibly soon also – Italy, should quickly become inapplicable in practice.

In the Nordic countries, too, there are increasing signs of border controls becoming permanent. The Danish government's current budget sets aside a good 30 million euros each year for border management. These investments could also result in new border installations on the Danish-German land border. Almost all political parties in Denmark and the majority of the population are in favour of retaining border controls – a position that has been boosted by ongoing political backing for border controls by larger countries such as Germany. Without this support, it would be harder for Denmark to assert its interests in the EU.

The Swedish government previously declared its willingness to return to regular freedom of movement as soon as possible. During its parliamentary election campaign in the summer of 2018, however, the red-green coalition government reversed its position under pressure from the right-wing nationalist Swedish Democrats. In July, identity checks were extended to all major international airports and ports. As the elections on 9 September resulted in protracted negotiations on forming a new coalition, Sweden's final position on the matter is unclear for now. However, any new government is likely to continue this policy for the time being.

In any case, the current Austrian EU Presidency has been prioritising external borders instead of abolishing internal controls. Already in June 2018, the FPÖ-led Ministry of the Interior organised an exercise for the emergency closure of all border crossings to Slovenia – even including military forces. Italian Minister of the Interior, Matteo Salvini, meanwhile, uses ongoing French controls at the border near Ventimiglia to legitimate his own controversial migration policies. France must first

end these measures before he would even consider European requests to open Italian ports to refugee ships again. Irrespective of Salvini's argument, it must be remembered that the compromise reached in 2013 on the design of longer-term internal border controls under Article 29 was intended to defuse tensions between France and Italy. The fact that this legal basis is not respected any more – or side-stepped through the consecutive use of Article 25 – aggravates the political crisis.

Many other Schengen member states and the European Parliament are also increasingly critical. They say it is difficult to understand why internal border controls should be a necessary and effective measure to maintain the national security of the six states concerned. There is little proof of their effectiveness, especially in Germany where the two permanent control points to Austria are relatively easy to circumvent. But even limited border checks cause traffic disruptions that have a significant impact on transnational supply chains, commuter traffic and tourism.

In addition, Eastern and South-Eastern European member states ascribe a special historical and political value to principle of freedom of movement. The position of several Western European states in denying Romania and Bulgaria full membership of the Schengen area for as long as possible, reinforces the perception of a two-tier system in this region of the EU. On the one hand, Eastern European countries are closely monitored in terms of compliance with Schengen law and are also strongly criticised for their refugee policies. On the other hand, the EU Commission is bowing to pressure from Western and Northern European states not to formally challenge the erosion of legal procedures and time limits for internal border controls.

Amending the Schengen regulation

In June 2018, the outgoing Bulgarian EU Presidency presented a reform proposal for the Schengen regulation which is currently

under discussion in the European Parliament. The aim is to clarify and tighten the applicable rules on temporary border controls. The current practice of repeatedly extending border checks for six months is to be prohibited. Exceptional measures to safeguard national security (Article 25) should not exceed a period of one year and should not be combined with other legal bases in the Schengen regulation. The existing internal borders controls would have to be lifted immediately once this regulation were adopted. Furthermore, the documentation for justifying temporary border controls should be significantly expanded. For short periods, the decision would be left to each Schengen member state. But when lasting into several months, comprehensive information about the necessity and the effectiveness of temporary border controls would have to be provided, on which directly affected neighbouring countries could comment. This amended procedure for Article 25 would approximate the common Council decision on temporary border controls with respect to systemic risks to the Schengen zone, as already foreseen in the Article 29 procedure.

Yet current political debates in the controlling states appear irreconcilable with such a tightening of the Schengen regulation. Adopting this reform by qualified majority in the EU's Council of Ministers might, therefore, lead to bitter clashes. As a last resort, outvoted member states might try and invoke their primary-law competence on issues of public order and national security under Article 4(2) of the EU Treaty to reject a new secondary-law obligation to lift internal border controls. Retreating to such a position would pose serious risks to the EU's migration policy or entire legal order. If powerful states such as Germany and France were to argue openly for the primacy of national security over existing EU law, it will become impossible to maintain effective pressure on Poland and Hungary. The latter already justify their growing disregard for the Rule of Law and the EU acquis by referring to an overriding need to protect their population and

national identity. The Italian government would also be encouraged to pursue ever more unilateral policies. Even though Italy's interests in the field of migration appear to clash with Hungary's position, there is already a nascent alliance in the run-up to the 2019 European elections in order to renationalise competences.

A further weakening of the Schengen regime would also risk losing Spain as a partner for European approaches to the migration crisis. Spain has an essential interest in the freedom of movement because of its tourism and export industries. In the summer of 2018, Madrid already criticised increased French controls on their land border. Overall, the EU and its member states risk a negative loop between the reform of the Dublin regulation – or related voluntary initiatives among a subset of member states, which could provide for the distribution of refugees and curb secondary migration – and the erosion of the Schengen regulation.

Risks of a one-sided reform

Ironically, a dogmatic solution in which all internal border controls were lifted quickly and fully could also trigger the breakup of the Schengen zone. In Denmark, for example, Schengen law only applies on a voluntary basis under international law. This is one of the effects of Denmark's special status in the EU's Justice and Home Affairs policy. In a referendum in December 2015, the Danish people rejected gradually phasing out this opt-out. As a first consequence in 2016, Denmark's full membership of Europol was downgraded to observer status. In the past, Denmark has voluntarily adopted all amendments to Schengen legislation. This can no longer be expected in the future. As early as 2011, the right-wing nationalist Danish People's Party initiated plans to reintroduce passport controls at the border with Germany. At that time, the project met with sharp criticism from Brussels and Berlin. When a different centre-left coalition government came to power in

September 2011, the issue seemed to have resolved itself. In the current situation, however, a further restriction of national freedom to decide on border controls could persuade Denmark to opt out of an amended Schengen regulation.

The practical consequences of such a development are, as yet, unknown. In the worst case, Denmark would lose full freedom of movement in the Schengen zone and access to the Schengen Information System. This would not only have serious consequences for Danish security interests, outweighing any security benefits gained from border controls, but could also fuel the ongoing fragmentation of the EU and separate Northern Europe from Central Europe. Last but not least, such a step would have drastic consequences for inner-Nordic relations which have been based on the principle of open borders for decades. The Nordic Passport Union, founded in 1954, guaranteed the citizens of all participating states the right to cross borders without controls and even without a passport. In order to maintain the inner-Nordic free movement of persons following the accession of Denmark, Finland and Sweden to the Schengen system in 2001, non-EU members Norway and Iceland also took this step. However, the Schengen Agreement was never appreciated in the North. Above all, the opening of EU internal borders towards Central Europe was associated with fears of growing immigration, crime and smuggling.

Danish Prime Minister, Lars Løkke Rasmussen, proposed a Nordic 'mini-Schengen' in early 2016. The consequence would be joint passport checks at the external borders of Nordic countries to stop illegal immigration and to reinstate freedom of movement between the Nordic countries. This would constitute a de facto return to the Nordic Passport Union in contrast to the existing Schengen membership. Although the Swedish government signalled its general agreement to deepen security cooperation with Denmark, its response to the idea of joint controls was rather more reserved. At a meeting on 1 June 2018, the Ministers of Interior and Justice of the five

Nordic countries only agreed to step up cross-border operational police cooperation, including joint patrols in border regions, but with a primary focus on combating crime. In this respect, it is currently unclear whether greater Nordic cooperation will serve as regional support for the overarching Schengen regime, whether it could gain importance as a standalone alternative, or whether Nordic cooperation itself would break apart.

The strategic value of Schengen

The Schengen regime has overcome several crises in the past three decades and developed numerous security mechanisms to compensate for the free movement of persons. This can be seen, for example, in the enhanced functionalities of the Schengen Information System and its increasingly obligatory use to combat serious crime and terrorism as well as to enforce entry ban decisions. The Schengen regime is also a prime example of flexible integration as it accepts non-EU members as well as special rules for individual members, as for instance in the case of Ireland. Even if the free movement of persons were to be partially curtailed, this would not necessarily plunge the EU into an existential crisis. The political rhetoric that the EU would fail if Schengen failed was only plausible at the height of the refugee crisis.

Nevertheless, the six states currently carrying out border checks should abandon their one-sided concern with secondary migration and carefully weigh up the long-term consequences of their actions. There is little time left to strike a compromise between the proponents of open internal borders and advocates for security. The concerned states already declared their intention to prolong their border checks for another six months after mid-November, whereas Commission president Juncker clearly stated in his last major speech from September that this practice should come to an end.

The existing reform proposal to amend Schengen regulations by defining clear deadlines and justifications would help

restore confidence among all the Schengen member states. To return to a common understanding of the applicable Schengen rules would also help clear the way to decide on the upcoming Schengen accession of Romania, Bulgaria and Croatia. It should be noted that Romania will hold the EU Presidency in 2019 and Croatia in 2020. The costs of current border controls for regional economies and smaller countries like Slovenia should not be underestimated either.

It would be particularly damaging if proposals to reform Schengen and the Dublin regulation, which is still to be finalised before the 2019 European elections, would come to block each other. The North-Western member states of the EU have a legitimate interest in curbing secondary migratory flows and transferring irregular immigrants to first-arrival states in accordance with the Dublin regulation. However, stationary border controls are only of limited use, especially for countries with long land borders. Reforming the Dublin regime or at least a more stringent implementation of the existing regulation is clearly more helpful in this regard. But Italy, and potentially Spain, see open internal borders as a prerequisite for cooperation.

Yet, even if the proposed Schengen reform could be adopted in the near future, all member states should be prepared for a growing opt-out by Denmark. As its domestic political discourse is currently influenced by right-wing nationalism, one can expect that maintaining national border controls will be considered more important than aligning itself to an amended Schengen regulation that reduces their leeway to take action at the national level. In Sweden, too, once a government has been formed it will need to decide what direction it wants to take on border control and internal security — a nationalistic, Nordic or more EU-focused one. These scenarios show the importance of a forward-looking and strategic approach to the smouldering Schengen crisis. If decision-makers continue to stumble along for six months at a time, previously unthinkable developments of regional compartmentalisation, such as those expressed in the

idea of a Nordic or Western European mini-Schengen may eventually become reality.

Compensatory measures for the free movement of persons

The political efforts of all six controlling Schengen members should, therefore, focus on highlighting the overarching value and manageable risks of open internal borders while, at the same time, investing in compensatory security measures. In particular, this means significantly expanding police checks in areas close to the border or “dragnet controls”, as practiced in Germany and Switzerland. This approach was expressly recommended by the European Commission in March 2016, provided that such police checks are not systematic but based on reasonable suspicion. However, ensuring the police comply with the principle of non-discrimination is not easily guaranteed in practice. This issue was brought before the European Court of Justice in 2010 and has since been raised in several national cases. It is partly for this reason that the Danish and Swedish governments have rejected intensifying police border checks so far, suggesting they are inadequate or incompatible with national legislation. Norway, on the other hand, has followed the Commission’s recommendation and its police are carrying out more checks on individuals in the southern border hinterland.

Such differences should be overcome by further developing and harmonising national police legislation and operational practices for curbing secondary migration, including cooperation with asylum authorities. Technical systems to automatically register number plates could make an additional contribution to border security without stationary controls. National politicians need to proactively highlight the operational value of such compensatory security measures, especially compared to stationary border con-

trols that can only be carried out selectively.

From a European perspective, the proposed boost to the competences, resources and manpower of Frontex and the expansion of EU databases for migration and border control, which is already under way, should be seen as additional weighty reasons to justify lifting temporary internal border controls. Conversely, the strong interests of Italy and Eastern European states to retain open internal borders are to be used to counter their objections to the proposed 10,000-strong EU border guard with increased executive powers. However, decision-makers must also clearly communicate that this further strengthening of the EU’s external border security will take several years and will never put a complete end to irregular migration. Therefore, this long-term objective and structural challenge to manage migration should not serve as a pretext for ignoring the current time limits for internal border controls.

Restoring the full freedom of movement and mutual trust inside the Schengen zone can also be justified from an operational perspective, given the relatively low numbers of irregular migrants currently arriving in the EU. If it were not possible to return to commonly recognised Schengen law under these conditions, the only way forward in the event of a renewed mass influx would be unilateral and uncoordinated national border controls. So instead of difficult but by no means hopeless negotiations to find a compromise between the imperative of free movement of persons and the need for migration control, one would see a complete dissolution of the common Schengen regime. Germany especially, as the country with the most internal European borders, should focus its political efforts now to avoid such an extremely damaging and costly scenario in the future.

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