

Communication on Schengen governance — strengthening the area without internal border control (Brussels, 16 September 2011)

Caption: The Commission in this document, dated 16 September 2011, proposes to strengthen the Schengen acquis by means of a governance system capable of responding effectively, and in a timely and coordinated Union-wide way, to exceptional circumstances and challenges which might put the overall functioning of Schengen at stake. The Commission also proposes to initiate a more regular and structured political dialogue between the European Institutions on the functioning of the Schengen area.

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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

Schengen governance - strengthening the area without internal border control

1. INTRODUCTION

1.1. *An area without internal border control*

Free movement is a defining principle of the European Union and the ability to move within the European Union (EU) without facing border checks at internal borders is one of its most successful achievements. Many people use this freedom, making more than a billion journeys within the EU every year, and public opinion consistently ranks freedom to travel as among the most important benefits brought about by the Union¹. Moreover, an area without internal border controls is central to the success of the single market, including the free movement of workers, goods and services, and Europe's continued efforts to boost economic growth.

The Schengen area is based on a body of rules (the Schengen *acquis*) which encompasses not only the abolition of border control at internal borders and common rules on the control of external borders but also a common visa policy, police and judicial cooperation, common rules on the return of irregular migrants and the establishment of common data-bases such as the Schengen Information System (SIS).

The fundamentals of Schengen cooperation are sound but recent developments have highlighted the need to ensure that the Schengen area can cope effectively with strains which may be placed on it by weaknesses at its external borders or by external factors beyond its control. The Union response must address these diverse challenges while safeguarding the citizen's right to free movement.

Accordingly, in its May Communication on Migration², the Commission pointed to the need for a coordinated Union-level response to such situations and indicated that it might propose an appropriate mechanism as well as other means to ensure a coherent implementation and interpretation of the Schengen rules.

In like manner, the European Council of 23-24 June 2011³ called for a mechanism to be 'introduced in order to respond to exceptional circumstances putting the overall functioning of Schengen cooperation at risk, without jeopardising the principle of free movement of persons.' The Commission was invited to submit a proposal to this end in September 2011.

This Communication and the accompanying legislative proposals⁴ respond to that request as well as to the call from the Justice and Home Affairs Council in June for enhanced political guidance on Schengen cooperation⁵ and to the European Parliament's resolution in July⁶ which required that any new mechanism should focus on enhancing the freedom of movement and reinforcing EU governance of the Schengen area.

EU citizens expect to be able to enjoy the right of freedom of movement and to travel freely in a safe, border-free Europe. Criminal, terrorist or other threats should not be allowed to put this in jeopardy. At the same time, the Union and its Member States must be able to react

¹ Eurobarometer, 'Public Opinion in the European Union – Spring 2011', pp. 31-32.

² COM (2011) 248 of 4.5.2011

³ EUCO 23/11 of 24.06.2011

⁴ COM(2011)559 and COM(2011)560

⁵ 11476/11 [ASIM 64 COMIX 395]

⁶ P7_TA(2011)0336

rapidly and effectively to serious threats to public policy and internal security. With this comprehensive package of inter-linked measures, the Commission seeks to establish a coordinated, EU-based response which ensures that the fundamental principles of Union law and in particular the right of free movement are safeguarded, and which would allow all European interests to be taken into account in securing the Schengen area, while setting limits to unilateral national initiatives which, in isolation, can never be an effective response to common threats. Ensuring that the exceptional and temporary reintroduction of border controls at internal borders is decided upon in accordance with the Community method, and taking into account the Commission's general accountability towards the European Parliament, is an essential and indispensable element of this package of measures.

2. STRENGTHENING THE MANAGEMENT OF THE SCHENGEN AREA

The free movement of citizens within the area without internal border controls is based on a system which relies on mutual trust that each participating State will be ready and able to implement the various legislative instruments comprising the Schengen *acquis*.

The European Union has already put in place tools to support Member States to help them meet their obligations and to react to critical circumstances which might put Schengen at risk. For example, Member States can seek financial and practical support from the Commission via the EU Funds. Frontex can organise joint operations or deploy Rapid Border Intervention Teams. Member States can also address other Member States, Europol or the European Asylum Support Office (EASO) for further assistance. More detail is given in Annex 1.

In addition, as stated in its May Communication on migration⁷, the Commission, together with the Member States, will continue its work on guidelines to ensure a coherent implementation of the Schengen rules. The process was launched with an expert meeting in July 2011. The experts will identify shortcomings and areas where there might be need for further clarification on the Schengen *acquis*, for example on the issuing of travel documents and residence permits.

These tools can not, however, of themselves alone ensure that the Schengen rules are applied in a consistent manner by each Member State. The means to check this is the Schengen evaluation mechanism, used to monitor the application of the Schengen *acquis* and issue recommendations on any shortcomings. The current mechanism, relying on an inter-governmental system of peer review, is not strong enough to effectively remedy all weaknesses. That is why the Commission proposed a Union-led approach last year⁸.

At the heart of this new approach is the possibility for announced or unannounced visits to a given Member State by Commission-led teams to take place, with experts from other Member States and Frontex, to verify the application of the Schengen *acquis*. A report drawn up following each visit would identify any shortcomings with clear recommendations for remedial action and deadlines for implementing them. The evaluated Member State would then have to establish an action plan setting out how it intends to address these recommendations. Union-level checks on the action plan's implementation could include further visits.

⁷ COM(2011)248

⁸ COM (2010) 624 of 16.11.2010.

These changes will improve the evaluation and monitoring system but they do not address situations where these steps, even combined with the measures described in Annex 1, are insufficient to remedy a Member State's deficiencies in implementing the *acquis* and, in particular, in controlling its external borders.

Therefore, where measures taken at the Union or national level do not improve the situation, it might be necessary to reintroduce border control at internal borders with the failing Member State, where the situation is such as to constitute a serious threat to public policy or to internal security at the Union or national level. Such an action would only be taken as a measure of last resort, and only to the extent and for the duration necessary to mitigate in a proportionate manner the adverse consequences of the exceptional circumstances. The inclusion of such an possibility in the Schengen governance system would also serve as a preventive measure, with deterrent effect.

For that reason, the Commission is amending its 2010 proposal to address this situation.

3. EXCEPTIONAL CIRCUMSTANCES WHICH MAY RESULT IN THE RE-INTRODUCTION OF INTERNAL BORDER CONTROLS AS A MEASURE OF LAST RESORT

How the re-introduction of internal border controls works today

Under the Schengen Borders Code⁹, a Member State may temporarily re-introduce border controls at their internal borders in exceptional circumstances, where 'there is a serious threat to public policy or internal security'. If the threats motivating the re-introduction are foreseeable, the Member State in question must notify other Member States and the Commission 'as soon as possible' with all relevant information about the scope and duration of the re-introduction, and the reasons for doing so. The Commission may issue an opinion on the notification, which may result in consultations between Member States and the Commission. In urgent cases, the re-introduction may be effected immediately.

The Commission reported in October 2010¹⁰ that this possibility to re-introduce internal border controls had been used 22 times since the Code's entry into force in October 2006. Since the publication of the report, internal border controls have been re-introduced by Member States on a further four occasions, most recently by Norway and Sweden in response to the terrorist incidents in Norway. In most cases, though, the re-introduction of border controls has been used to enable police authorities to manage the security implications of major sporting events, political demonstrations, or high-profile political meetings. A unilateral re-introduction of border controls has never exceeded 30 days, and has usually been for a much shorter period.

However, the information Member States are required to provide to other Member States and the Commission often does not arrive in sufficient time, or contain sufficient details, to enable the Commission to usefully issue an opinion concerning the notification.

Need for a European Union-level mechanism

⁹ OJ L 105 of 13.4.2006, p. 1.

¹⁰ COM(2010)554

Since the free movement of persons within the area without internal borders is a key Union achievement, the benefits of which are enjoyed by all the persons living in this area, it should as a general rule require a decision to be taken at the Union level, rather than for such decision to be taken unilaterally at the national level.

A coordinated, EU-based response would allow all European interests to be taken into account. Such a response would address situations where a Member State faces a serious short-term, largely localised, threat to public policy or internal security, as well as situations with wider and longer-term implications. In both instances, a coordinated European response is warranted, as it is inherent in any decision to reintroduce internal border controls – even for a limited period of time and within a limited geographic area – that the human and economic implications will be felt beyond the State resorting to such measures. The case for such a coordinated European approach is all the more compelling where a section of the external border comes under unexpected and heavy pressure, or where a Member State has been persistently failing to control its section of the external border.

Border control should only be reintroduced as a last resort in these circumstances, and only after other measures have been taken to stabilise the situation at the relevant external border section either at the European level, in a spirit of solidarity, and/or at national level, to ensure better compliance with the common rules.

Proposed reinforced EU-based approach for exceptional re-introduction of internal border controls

A serious threat to public policy or to internal security will remain the only grounds for the reintroduction of internal border controls. The strict criteria for the exceptional derogation from the area without internal borders are not being loosened and will be applied to every scenario in which such a measure is contemplated. This will be the case for events like major sporting events or high level political meetings, but also for events requiring immediate action such as terrorist or other criminal attacks such as the recent atrocity in Norway.

The adverse consequences of either a Member State's persistent failure to adequately protect a part of the EU's external border, or of a sudden and unexpected inflow of third-country nationals at a part of that border, could both, under certain circumstances, be characterised as constituting such a threat. Annex 2 summarises the main types of situation that may arise.

The main rule under the reinforced EU-based approach would be that any decision on the reintroduction of internal border controls would be taken by the Commission as an implementing act involving the Member States accordingly. The European Parliament would be duly informed of such measures. The decision would determine the scope and duration of the reintroduction of controls, and would be for renewable periods of up to 30 days, with a maximum duration of six months. Exceptionally, this six month limit would not apply to situations where the reintroduction of internal border controls results from an adverse finding under the Schengen evaluation mechanism on account of a Member State's persistent failure to adequately protect its section of the external border.

In urgent situations, however, Member States could still take unilateral action to reintroduce internal border controls, but only for a limited period (five days), any extension of which would need to be decided under the new EU procedure for implementing acts.

When deciding on the temporary reintroduction of border control an assessment must be made of the necessity of resorting to such a measure in order to mitigate the threat to public policy or internal security at the Union or national level giving rise to the request or initiative for the reintroduction of border control at internal borders, as well as an assessment of the proportionality of the measure to that threat. This assessment must be based on the detailed information submitted by the Member State or States concerned or any other relevant information. In making such an assessment, the following considerations must in particular be taken into account:

- the likely impact of any threats to public policy or internal security at the Union or national level, including threats posed by organised crime or terrorist activities;
- the availability of technical or financial support measures which could be or have been resorted to at the national and/or European level, including assistance by Union bodies such as Frontex or Europol, and the extent to which such measures are likely to adequately remedy the threats to public policy or internal security at the Union or national level;
- the current and likely future impact of any serious deficiencies related to external border control or return procedures identified by Schengen evaluations in accordance with the Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*;
- the likely impact of such a measure on free movement within the area without internal border controls.

The reintroduction of internal border controls is clearly a measure of last resort which could only be contemplated where all other measures have proved incapable of effectively mitigating the serious threat identified.

It should be emphasised that, where internal border controls are introduced, the Member State concerned remains bound by its obligations to ensure the right of persons entitled to freedom of movement under the Treaties and the Charter of Fundamental Rights and under Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Even in the event of the temporary reintroduction of border control at internal borders, Union citizens and their family members can thus enter the territory of another Member State on the simple presentation of a valid passport or ID card. All procedural safeguards enjoyed by a Union citizen and their family members remain in place. Third country nationals legally staying within the Schengen area will also be able to continue to travel on the basis of their travel document and, where necessary, their valid visa or residence permits.

4. EU OVERSIGHT OF SCHENGEN GOVERNANCE

As the area without internal border control represents one of the most valued freedoms of the European Union for the persons living or travelling in this area, the EU institutions should therefore safeguard this freedom without compromising the ability of Member States and the EU to deal effectively with serious threats to security or public policy. So it is important to maintain a constant dialogue between the main political stakeholders on the functioning of the Schengen area and the challenges it faces. A reinforced Schengen evaluation mechanism,

combined with an EU-based mechanism for responding to exceptional threats, are legislative tools which will improve the effectiveness of the Schengen area as well as the transparency of its operation.

Besides these legislative instruments, regular reporting to the European Parliament on the outcome of the different monitoring visits in the context of the operation of the Schengen Evaluation Mechanism, and immediate information provided to the European Parliament concerning any step taken that might lead to the possible re-introduction of border control, will improve accountability and democratic control. In addition, the Commission will present a biannual overview to the European Union institutions on the functioning of Schengen. This will provide the basis for a regular debate in the European Parliament and in the Council and contribute to the strengthening of political guidance and cooperation in the Schengen area.

The Commission will also explore ways to improve public awareness about the way in which Schengen operates including through ensuring that adequate information is provided when an exceptional decision is taken to temporarily reintroduce border controls.

5. CONCLUSION

The Schengen area is vital for everyone living in Europe. The Commission proposes to strengthen the Schengen *acquis* by means of a governance system capable of responding effectively, and in a timely and coordinated Union-wide way, to exceptional circumstances and challenges which might put the overall functioning of Schengen at stake. The Commission also proposes to initiate a more regular and structured political dialogue between the European Institutions on the functioning of the Schengen area.

*Annex 1***EU MEASURES TO ASSIST MEMBER STATES IN MANAGING THEIR EXTERNAL BORDERS**

A Member State can call on practical and financial support to address a critical situation or a deficiency at its external borders from the following sources:

Frontex assistance

Frontex is the EU agency whose dedicated mission is to support Member States in controlling their external borders. The additional material means available to Frontex following the recent revision of its governing Regulation, as well as the extension of its mandate which this revision has brought about, will serve to enhance Frontex's capability to assist Member States facing particular challenges in the management of their external borders or in coping with the consequences of a large influx of migrants within a short space of time.

The practical assistance includes Joint Operations aimed, for example, at patrolling the external borders for the common interests of all Member States. An example is the ongoing 'Hermes' joint maritime operation in the southern Mediterranean, launched in February 2011 in the framework of the European Patrols Network, the primary objective of which is to control immigration flows from North Africa to Italy and Malta. The ongoing 'Poseidon' operation along the Greek-Turkish land and sea borders is another example of such a joint operation.

Assistance from Frontex may also take the form of the deployment of Rapid Border Intervention Teams (RABITs), following a request by a Member State. Such teams were deployed along the Greek-Turkish land border from November 2010 until March 2011. RABITs consist of border guards from a number of EU Member States under the operational command of the host Member State. Following the revision of the Frontex Regulation, the possibilities for assistance by Frontex have been rationalised and enhanced *via* the possibility to request deployment of European Border Guard Teams (EBGTs).

Frontex may also provide capacity-building assistance to a Member State to enable it to reinforce its technical and human resource capabilities to manage its borders or to meet other aspects of its obligations under the Schengen *acquis*, for example with regard to the return of irregular migrants. For example, Frontex has provided such assistance to Greece to develop its capacity to manage the return of irregular migrants.

EU Funding

Financial solidarity between the Member States of the European Union in the area of border management is granted through the European Border Fund (EBF). Funding which may have a direct or indirect impact in assisting Member States to cope with the influx of migrants is also available under the other migration-related EU funds, notably the Return Fund, the European Refugee Fund and the European Integration Fund. Funds are available as part of the annual disbursements for activities organised at the national level (using national allocations) or across a number of Member States ('Community actions'), or in the form of emergency disbursements, and are managed by the Commission. Italy has, for example, been granted emergency funding under the EBF (and the ERF) in 2011, which is helping it to cope, at least partially, with the consequences of the large inflow of North African migrants it has been

faced with this year. Over the past few years, Greece, Malta, Spain and Italy have also received support via "specific actions" of the EBF to address weaknesses at border points.

In the Communication "A dialogue for migration, mobility and security with the southern Mediterranean countries", the Commission took the view that sound border management will be possible only if adequate EU financial resources are mobilised. Moreover, the Commission, in the Communication "A budget for Europe 2020" has proposed a very significant increase in funding dedicated to home affairs policies, amounting to a total of some 8.2 billion Euros for the 2014-2020 period, in order to ensure that migration issues are tackled appropriately and in a timely manner.

Other support measures

Depending on the circumstances being faced by the Member State in question, and in particular if a large number of asylum seekers have arrived in that State, it may be useful to seek assistance from the EASO, perhaps in the form of Asylum Support Teams who could, for example, provide technical advice concerning the reception or processing of claimants. Greece has received this kind of capacity-building assistance from the EASO in recent months, with a view to strengthening the main aspects of its asylum system.

Likewise, if the challenges faced by the Member State in question have a criminal dimension, it may be appropriate to seek assistance from Europol. If, for example, criminal networks are involved in smuggling or trafficking migrants, Europol may be able to assist in devising and implementing effective measures against such networks. Europol has been assisting Italy in recent months by providing risk assessment concerning the extent to which the volatile political situation in the region might be exploited by criminal or terrorist networks. It has also been providing assistance to Italy on the ground on Lampedusa, ensuring real-time access to criminal data-bases and assisting in the gathering of information.

In certain circumstances, one or more Member States may be in a position to provide *ad hoc* assistance to a Member State in difficulty, particularly if the assisting Member State is directly affected by the crisis situation in the other State, perhaps because they are a neighbouring State, or if they possess some particular capability or expertise that might be useful to the Member State in difficulty.

Cooperation with third countries

The EU and its Agencies are in a position to take a variety of steps to cooperate and enter into dialogue with third countries of origin or transit, with a view to assisting in reinforcing border control and stemming the flow of irregular migration to the Union. Such assistance may, for example, take the form of financial or material assistance to the third country in question, for example, to assist that country in coping with a humanitarian crisis. Likewise, the assistance to Member States by intervening with third countries could take the form of discussions regarding readmission of irregular migrants originating from that third country, or it could consist in the provision of technical migration-management-related assistance or the implementation of a Regional Protection Programme.

Annex 2

MAIN KINDS OF EXCEPTIONAL SITUATIONS IN WHICH TEMPORARY RE-INTRODUCTION OF INTERNAL BORDER CONTROLS MIGHT BE CONTEMPLATED

In order to illustrate how the new regime for the temporary and exceptional reintroduction of internal border controls would operate in practice, what follows is a non-exhaustive description of the main kinds of situations in which such measures might be considered, as well as an indication of the procedural steps that would be resorted to in such a case.

Foreseeable events with a largely localised short-term impact

Where the event giving rise to a need to reintroduce internal border controls is foreseeable, the Member State would notify the Commission and other Member States at least six weeks in advance with all relevant information relating to the reasons for doing so, and regarding the planned scope and duration. If the event in question is only foreseeable less than six weeks before the re-introduction measure needs to be taken, then it should be notified as soon as possible. This would be followed by a Commission decision as an implementing act, taken *via* the examination procedure in which the necessity and proportionality of the planned measures would be assessed (Article 5 of the Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers¹¹).

Experience shows that this type of scenario corresponds to the situations most likely to give rise to decisions on the reintroduction of internal border controls, for example in relation to major sporting events, political demonstrations, high-profile political meetings and so forth.

Urgent unforeseen, short-term events

Some events giving rise to a need to take drastic short-term measures to safeguard security or other critical public interests, including the possible reintroduction of internal border controls for a limited period, are by their nature unforeseeable. This could be the case, for example, in the event of terrorist attacks or other major criminal incidents, where there is a need to take all possible measures to ensure the prompt apprehension of the perpetrators.

In such circumstances, Member States may immediately reintroduce internal border controls for a period of up to five days. If they wish to prolong it beyond this period, they must notify the Commission and Member States accordingly. Such an extension can be decided upon promptly via a special urgency procedure as laid down in Article 8 of the above mentioned Regulation No 182/2011.

A persistent deficiency to manage a section of the Union's external border

In certain circumstances, it may be necessary, as a last resort after having exhausted other measures, to mitigate the adverse impact of the failure by a Member State to control its section of the external borders by resorting to the temporary reintroduction of some internal border controls.

The deficiencies in border management would be identified in the report prepared as part of the evaluation mechanism which would include recommendations on how to address the deficiencies. The Member State concerned would be required to draw up an action plan aimed

¹¹ OJ L 55 of 28.2.2011, p. 13.

at fulfilling these recommendations, and its implementation would be monitored by the Commission. The Commission could request the Member State concerned to take certain specific measures such as requesting support from Frontex or closing a specific border crossing point for a period of time with a view to rectifying certain weaknesses. However, if these measures are proving ineffective in addressing the deficiencies, and insofar as the deficiencies constitute a serious threat to public policy or to internal security at the Union or national level, the Commission could decide on the temporary reintroduction of internal border controls. Before taking such a serious step, the Commission would take full account of the necessity and proportionality of doing so, including an assessment of its likely impact on the free movement of persons within the Schengen area.

Events with a potentially wide impact in the short or longer-term

Situations might arise where a large number of third country nationals cross the external border of one or more Member States. This might result in unexpected and significant secondary movements of third country nationals found to be staying irregularly in the territory of other Member States. In such a situation, and insofar as the circumstances would be such as to constitute a serious threat to public policy or to internal security at the Union or national level, the temporary reintroduction of some internal border controls might be considered as a last resort. A Member State wishing to reintroduce internal border controls in such circumstances could make a request to the Commission in the manner described above for foreseeable events. The Commission, before taking such a decision would need to consult Member States and stakeholders concerned and to be convinced that this would be the *only* measure likely to be effective, having considered all other measures including those described in Annex 1.

The crossing of the external border of a large number of third-country nationals might, in certain circumstances, justify the immediate reintroduction of some internal border controls for a period of time, in order to ensure that the necessary measures can promptly be taken to safeguard public policy and internal security at the Union or national level. In such circumstances, a Member State could reintroduce internal border controls for a period of up to five days in the manner described above for unforeseen events. If it wishes to prolong the reintroduction beyond this period, it must notify the Commission and Member States accordingly, and an extension can be granted at the Union level *via* the special urgency procedure laid down in Article 8 of Regulation No 182/2011.

The re-introduction of some targeted controls on selected internal borders could ensure that third country nationals found to be staying irregularly are apprehended and returned, preferably voluntarily, in accordance with the terms of Directive 2008/115 (the Return Directive), either directly to their country-of-origin, or to the Member State through which they have transited if this is possible because of the existence of a bilateral agreement providing for the possibility of such returns. It could also allow the activities of criminal networks to be disrupted, especially if large numbers of the migrants in question are considered likely to be the subject or victims of organised smuggling or trafficking within the Union, or to be involved themselves in criminal activity.